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91-1984

Supreme Court, U.S.
FILED
JUN 4 1992
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Petitioner,

v.

SHERMAN J. OLIVIER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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v.

SHERMAN J. OLIVIER,

Respondent.

APPEARANCE OF COUNSEL

The clerk is requested to enter my appearance as counsel for South Carolina Property and Casualty Insurance Guaranty Association ("SCIGA") who in this Court is Petitioner. I certify that I am a member of the bar of the Supreme Court of the United States.

By: _____
GREGORY C. BUFFALOW
Counsel of Record for South Carolina Property and Casualty Insurance Guaranty Association

QUESTIONS PRESENTED FOR REVIEW

1. Whether the finding of personal jurisdiction under the facts of this case is contrary to the Due Process requirement from the Fourteenth Amendment that a defendant must have minimum contacts with and purposefully avail himself of doing business in the forum in order for a federal district court to exercise personal jurisdiction? The Court is asked to review the finding of quasi in rem jurisdiction (erroneously characterized as personal jurisdiction) since Petitioner SCIGA has transacted no business in the state of Alabama, has maintained no offices in the state of Alabama, and has held no interest in property in the state of Alabama, and has employed no agents or employees whatsoever in the state of Alabama.

2. Whether a federal court may constitutionally require a state insurance guaranty association to submit to personal

jurisdiction in another state, where there has been no consent to be sued outside of the state of creation? The Court of Appeals would have all such state guaranty associations consent to jurisdiction in all states by virtue of having statutorily assumed certain limited obligations or covered claims of insolvent insurers, for the benefit of resident insureds. It is submitted that the statutes do not consent to jurisdiction outside of the state of creation, and for the Eleventh Circuit to hold otherwise, based on a legal fiction, thus raises the question whether the court below has failed to give full faith and credit or proper deference to the limited grant of jurisdiction from the affected states and, in so doing, has acted contrary to the provisions of the Tenth and Fourteenth Amendments.

3. Whether a state may constitutionally exercise quasi in rem jurisdiction over a garnishee, unincorporated state insurance

guaranty association, created by statute, where the creating state has not consented for its guarantor to be sued out of state?

4. Whether a federal district court applying state garnishment law following trial of a Jones Act suit, may constitutionally exercise quasi in rem jurisdiction, as a substitute for personal jurisdiction, based on a legal fiction that a non-resident state insurance guaranty association is deemed the insurer, where the association has no forum contacts, by attaching the limited statutory obligations of the out-of-state association?

5. Whether a finding of jurisdiction against an out-of-state non-profit, unincorporated state insurance guaranty association is to be as easily imposed as against an out-of-state-for-profit insurer, and thus, whether the decision of the Court of Appeals below is inconsistent with the result in Rush v. Savchuk, 444 U.S. 320, 62 L.Ed.2d

516, 100 S. Ct. 571 (1980)?

6. Whether the quasi in rem garnishment procedure was erroneously applied as the equivalent of personal jurisdiction, where the garnishee had no presence in the forum, and apart from a legal fiction, there was no res in the district that could be attached?

7. Whether the need for uniformity on the issues presented, and differing results in various jurisdictions including two Courts of Appeal, require the grant of certiorari?

LIST OF THE PARTIES

South Carolina Property and Casualty Insurance Guaranty Association, Petitioner and Garnishee below.

Sherman J. Olivier, Respondent and Plaintiff below.

Louisiana insurance Guaranty Association, Garnishee below.

Alabama Insurance Guaranty Association, Garnishee below.

There are no parent companies or subsidiaries of the foregoing parties. Alabama Insurance Guaranty Association is not involved in the appeal. All parties to the appeal have previously filed Certificates of Interested Parties and Corporate Disclosure Statements in the Eleventh Circuit which remain correct.

There are two other parties in interest no longer active in the case, the insolvent employer Merritt Dredging Company, Inc. and Merritt's insolvent insurer, Midland Insurance

Company. Petitioner believes Merritt and Midland have no interest in the outcome of the petition.

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The majority and dissenting opinions are officially reported at Olivier v. Merritt Dredging Company, Inc., 954 F.2d 1553 (11th Cir. 1992) and set out at Appendix A. The opinion of the District Court is not reported and is set out at Appendix B.

STATEMENT OF THE GROUNDS FOR JURISDICTION

In reversing the district court finding that there was no personal jurisdiction, the Eleventh Circuit concluded that application of the Alabama Long-Arm Statute in a garnishment proceeding was permissible under the Due Process clause of the Fourteenth Amendment.

The date of the decision from the Eleventh Circuit sought to be reviewed is March 6, 1992. A suggestion of rehearing en banc was filed by Petitioner on or about March 26, 1992, which remains pending. Supreme Court Rule 13.4 provides that a suggestion of rehearing en banc does not extend the time for filing a petition for writ of certiorari. This petition is therefore timely filed within 90 days of the decision from the Eleventh Circuit.

The jurisdiction of this Court is based on 28 U.S.C. § 1254(1) and Supreme Court Rule 10. It is submitted that jurisdiction is proper since the decision of the Eleventh Circuit has

decided important questions of law in which the need for uniformity is great.

The Supreme Court should take jurisdiction since the decision from the Eleventh Circuit was inconsistent with the result reached in a previous decision from the Second Circuit, Rhulen Agency, Inc. v. Alabama Ins. Guar. Assoc., 715 F.Supp. 94 (S.D.N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2d Cir. 1990)(jurisdiction denied), and a previous Florida decision, South Carolina Ins. Guar. Assoc. v. Underwood, 527 So.2d 931 (Fla. Dist. Ct. App. 1988)(jurisdiction denied). But see Georgia Insurers Insolvency Pool v. Brewer, 583 So.2d 377 (Fla. Dist. Ct. App. 1991)(jurisdiction upheld).

EXISTENCE OF JURISDICTION BELOW

Jurisdiction for garnishment in the district court was based on Ala. Code § 6-6-390 (1975), following a jury trial of a Jones Act

claim. Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 1291. There has been no determination of subject matter jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Art. IV, Sec. 1; Amend. X and Amendment XIV, Sec. 1, all as set forth in the Appendix.

STATUTORY PROVISIONS INVOLVED

Alabama Long-Arm Statute, Rule 4.2(a), Ala.R.Civ.P.; Alabama garnishment statute, Ala. Code § 6-6-390 (1975); and various statutes creating South Carolina Property and Casualty Insurance Guaranty Association, S.C. Code Ann. §§38-31-20(3), 38-31-30, 38-31-40, 38-31-60(a), 38-31-60(b), 38-31-60(c), and 38-31-100(2) (1988), all as set forth in the Appendix.

STATEMENT OF THE CASE

The basis of jurisdiction in the court of first instance was the Jones Act, 46 U.S.C. §688, and in the Eleventh Circuit, 28 U.S.C. §1291.

This petition presents the question whether a State may constitutionally exercise personal jurisdiction over a defendant unincorporated insurance guaranty association which has no officers, agents or employees, or real or personal property in the forum state. The sole jurisdictional contact for a due process analysis is the legal fiction that a guaranty association may be "found" since the association is deemed the insurer for a covered claim. It is submitted the Eleventh Circuit erroneously found personal jurisdiction, reversing the district court, by treating the quasi in rem attachment procedure under Alabama law as the functional equivalent to a direct action against the unincorporated insurance

guaranty association who has no presence in the forum.

The underlying judgment which is the basis of the subject claims against the South Carolina and Louisiana insurance guaranty associations was entered on February 14, 1989. At that time, Plaintiff Sherman J. Olivier, a Louisiana resident, obtained a judgment in Alabama in the amount of $522,190.00 against his South Carolina employer, Merritt Dredging Company, Inc. The jury award was based on the Jones Act and general maritime law for alleged personal injuries sustained on or about August 1, 1983 while Olivier was employed by Merritt as a seaman and member of the crew of a vessel.

Merritt had previously filed a bankruptcy petition pursuant to Chapter 11 of the United States bankruptcy laws and Merritt's insurer, Midland Insurance Company, had been placed in liquidation pursuant to an order entered by the Supreme Court of New York. Due to the

insolvency of both Merritt and its insurer Midland, Olivier sought writs of garnishment under Alabama law against the Alabama, South Carolina and Louisiana Insurance Guaranty Associations. On July 21, 1989, the district court issued the writ of garnishment by which Plaintiff sought recovery for the remaining amount of the judgment which had not been satisfied by excess underwriters, the principal amount of $469,645.98, plus interest and costs.

The writ against Alabama Insurance Guaranty Association is not involved in this appeal. The Louisiana and South Carolina Insurance Guaranty Associations, successfully requested dismissal in the district court on the grounds that the court lacked personal jurisdiction and that the garnishment procedure was improper to obtain personal jurisdiction.

The district court dismissed claims against SCIGA and the Louisiana Insurnace Guaranty Association ("LIGA") by order dated December

21, 1990 (App. B). As noted above, this decision was based on a factual determination that the garnishees "cannot be said to have purposefully availed themselves of the privilege of conducting business in this state . . . ." As noted, the Alabama Association is not involved in this appeal since it was clearly subject to suit in Alabama.

On January 18, 1991, Olivier filed a timely notice of appeal to the Eleventh Circuit. On March 6, 1992, the Eleventh Circuit reversed a finding that there was personal jurisdiction over the guaranty associations in the district court.

> We hold that the acts of guaranteeing insurance obligations within the state and of assuming the role of insurer are of such a nature that they justify the legal fiction that LIGA and SCIGA have consented to service of process and suit in Alabama.

954 F.2d at 1558. The decision further stated that, "by serving as guarantors of Midland's obligation to Olivier, LIGA and SCIGA

purposefully availed themselves of conducting activities within Alabama. Id.

The decision also contained a lengthy dissent by Senior Judge Frank M. Johnson who recognized that the provisions of the state statutes creating the guaranty associations "indicate a desire on the part of LIGA and SCIGA to be sued only in their own fora" so that these guaranty associations lack the requisite minimum contacts with Alabama. 954 F.2d at 1562. The dissent also argued that "the majority's minimum contacts analysis reflects an undue focus on foreseeability." Id. at 1560. The dissent further recognized that the guaranty associations' acts in guaranteeing insurance obligations was limited, in large extent, because there was not a wholesale adoption of all relevant policy terms. Thus, the dissent reasoned, the exposure of the guaranty associations was

clearly distinguishable from that of a private guarantor. Id. at 1561.

On March 26, 1992, the Louisiana and South Carolina Insurance Guaranty Associations filed a suggestion of rehearing en banc which remains pending before the Eleventh Circuit. Since no decision on the suggestion for rehearing en banc was made within 90 days after the entry of judgment, a timely petition for writ of certiorari was filed herein on June 4, 1992.

The factual record regarding jurisdictional contacts with Alabama is remarkably brief. The evidence consists solely of the applicable statutes creating the insurance guaranty associations, documentation of insurance coverage by Midland Insurance Company, issued to Merritt Dredging Company on or about April 1, 1983, and affidavits filed on behalf of LIGA and SCIGA which denied that either association had assets, property or employees within the state of Alabama, and further denied that

either of the associations is licensed to do business in the state of Alabama or has transacted any business in the state of Alabama.

The Midland policy is entitled "Workmen's Comp" and bears a handwritten caption "Maritime." It also has a typewritten addition to the cover page "Offshore," and contains a second page bearing captions "Workmen's Compensation," and "Amendments to Coverage B Endorsement--Maritime (Masters or Members of the Crew of Vessels) (Including Transportation, Wages, Maintenance and Cure)."

Petitioner SCIGA is wholly a creature of statute. As the dissenting opinion in the circuit court below observed, there is nothing in the statutory authority enacted by the South Carolina legislature to indicate that the State of South Carolina consented for its Guaranty Association to be sued outside the state of South Carolina. Instead, as the dissent noted, the provisions of the creating statutes suggest

otherwise, particularly the provisions governing priority where more than one state insurance guaranty association may be involved.

> Rather than purposeful availment, the priority provisions indicate a desire on the part of LIGA and SCIGA to be sued only in their own fora.

954 F.2d at 1562. The Guaranty Association statutes provide a limited guaranty of obligations of insolvent insurers only to the extent of a "covered claim." See, for example, S.C. Code Ann. § 38-31-20(3). There are numerous exclusions, however, and SCIGA is not responsible, e.g., for covered claims arising more than 30 days after the determination of insolvency. S.C. Code Ann. § 38-31-60(a)(i). Neither is the association liable for coverage involving ocean marine insurance. S.C. Code Ann. § 38-31-30. The statutes empower the association to "pay the full amount of any covered worker's compensation claim," but limit other obligations to $300,000.00. S.C. Code

Ann. § 38-31-60(a). Given these limitations, and the expressed preference for the interests of residents, S.C. Code Ann. §38-31-100(2), certainly the extent of the statutory guaranty is less than that of the commercial contractual guarantor in McGee v. International Life Ins. Co., 355 U.S. 220, 78 S. Ct. 199, 2 L.Ed.2d 223 (1957) relied on by the majority in the Eleventh Circuit below. Although the decision of the Eleventh Circuit assumed, for purposes of deciding jurisdiction, that the case involved a "covered claim," it has never been established by the trier of fact whether the parties intended the policy to be worker's compensation, employer's liability, ocean marine, P&I coverage or otherwise, or whether various statutory exclusions from coverage apply. Should the caption of the policy be controlling, i.e., so that this is a worker's compensation claim, significantly, the forum selection provisions of the statute would

require Olivier, a Louisiana resident, to "seek recovery first from the association of the residence of the claimant," S.C. Code Ann. § 38-31-100(2). If coverage for Olivier's Jones Act claim is deemed P&I type coverage, at least one court has held that P&I coverage for a Jones Act claim involves a type of "ocean marine insurance" which is excluded from coverage of guaranty acts. Backhus v. Transit Casualty Co., 1990 A.M.C. 417, 419 (La. 1989).

The actions of the Eleventh Circuit in finding jurisdiction, however, by relating the status of non-profit unincorporated insurance guaranty associations to that of commercial guarantors as in McGee, supra, would have drastic consequences in all 50 states, the District of Columbia, Puerto Rico and the U. S. Virgin Islands, which have property and liability insurance guaranty associations.

Since virtually every major insurance company in the United States issues policies

either to individuals in every state, or extends coverage to almost every state, then every state insurance guaranty association would be subject to suit in all 50 states. Thus any out of state guaranty association, designed to protect the residents of the state in which they are created, would be subjected to jurisdiction in foreign fora based on a legal fiction that the associations are "deemed the insurers" to the extent of an obligation on a "covered claim."

The issues in this petition are of first impression in the Eleventh Circuit and they are believed to be of first impression as to any United States court of appeal. See Olivier, supra, 954 F.2d at 1560 (dissent). The jurisdictional issue presented was addressed in Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n., 715 F.Supp. 94 (S.D. N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2d cir. 1990), reaching the opposite result from the Eleventh

Circuit herein, but the majority in the Eleventh Circuit below dismissed consideration of the contrary result from the district court herein and in Rhulen, since the Second Circuit had affirmed Rhulen based on a lack of subject matter jurisdiction without fully considering personal jurisdiction.

Thus, because there are differing results below, and since uniformity is desirable, the petition for writ of certiorari should be granted.

ARGUMENT AND CITATION OF AUTHORITIES

INTRODUCTION

The issues involved in this appeal present this Court with fundamental questions of exceptional importance which will not only affect the parties to this case, but all 50 state guaranty associations. Pursuant to the Post-Assessment Property and Liability Insurance Guaranty Associations Model Act, each state has, as a matter of legislative action, created a source of funds to aid its residents in the event they are faced with an insurance claim not covered due to the insolvency of an insurer. The issues presented in this action primarily concern whether out-of-state guaranty associations that are wholly creatures of statute, and are unincorporated nonprofit entities designed to protect the residents of the states in which they are created, may be subjected to personal jurisdiction in foreign fora without violating the Due Process Clause

of the Fourteenth Amendment to the Constitution.

The Appellate Court's opinion has effectively legislated that jurisdiction in any state may be obtained over out-of-state guaranty associations because the relatively uniform state statutes which have created them have provided that these associations are "deemed the insurers" to the extent of an association's obligation on a "covered claim," as defined by statute. See, S.C. Code Ann. §38-31-60(b) and §38-31-20(3). As a result, the Eleventh Circuit has opined that these associations have assumed insurance obligations in every state to a degree that is sufficient to invoke jurisdiction and not offend Due Process rights.

Since the issues are believed to be of first impression, and since the resolution of the conflicting decisions in Rhulen, Underwood and Brewer, supra, will effect state guaranty

associations nationwide, SCIGA has respectfully filed this Petition for Writ of Certiorari.

I.

SCIGA'S DUE PROCESS RIGHTS HAVE BEEN VIOLATED BY A FINDING OF JURISDICTION BY THIS COURT

A. SCIGA has not purposefully directed any activities towards the State of Alabama and does not have the minimum contacts necessary to satisfy the Due Process clause of the Fourteenth Amendment to the Constitution.

The Appellate Court's opinion effectively holds that by creating a statutory guarantee of insurance claims for its state's residents, each state's guaranty association has consented to suit in any jurisdiction where an insurance claim arises. Under the Appellate Court's reasoning, such personal jurisdiction is established even though the guaranty association itself has had no contact with the forum state, for the act of the statutorily imposed guarantee itself would constitute

"insurance obligations" in all states, which under the rationale in McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), would allow jurisdiction even though no other business has been conducted in the forum state.

The Supreme Court of the United States has held that the Due Process Clause prohibits a defendant from being haled into court in a foreign state as a result of fortuitous or attenuated contacts or as a result of the unilateral activity of a third person. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The Supreme Court has repeatedly held that one of the fundamental tests necessary to determine whether a defendant's liberty interest under the Due Process Clause has been violated by subjecting the defendant to the jurisdiction of a foreign forum is to examine whether the

defendant has established meaningful contacts, ties or relations with the foreign forum.

> The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'

Burger King Corp., supra, at 471-72 (quoting International Shoe Co. v. Washington, 326 U.S. 310 (1945)). The Supreme Court has determined that "all assertions of state-court jurisdiction must be evaluated according to the standard set forth in International Shoe and its progeny." Shaffer v. Heitner, 433 U.S. 186, 212 (1977). The progeny of International Shoe establish that the Constitution does not allow a state to exercise jurisdiction over a non-resident defendant unless that defendant "purposely avails" itself of the privilege of acting in the state by "deliberately" engaging in conduct there or by creating "continuing obligations" to residents of the state, so that

there can be said to be a "substantial connection" between the defendant and the forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-76 (1985). "The 'substantial connection' . . . must come about by an action of the defendant purposefully directed toward the forum state." Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112 (1987).

As pointed out in the dissenting opinion by Judge Johnson, the majority below has decided that SCIGA has established contacts, ties or relations sufficient to establish jurisdiction merely by virtue of the mere fiction of having guaranteed insurance obligations within the State of Alabama, and by assuming the role of insurer as to the claim asserted by Olivier. The Eleventh Circuit did not identify any "deliberate" act or any "purposeful availment" by SCIGA directed towards the state of Alabama.

The finding of contacts by virtue of SCIGA's limited guaranty of insurance

obligations within Alabama is in error and SCIGA's Due Process rights would be violated by Alabama's exercise of jurisdiction. The South Carolina Act does not guarantee insurance obligations in Alabama. The Act focuses only on the State of South Carolina and guarantees claims relating only to South Carolina insureds, claimants or property. Guaranty associations in every state have similar statutes in order to protect the residents of their respective states.

The only connection involving the State of Alabama is that the injury occurred in Alabama. Such fortuitous circumstances are not sufficient to invoke jurisdiction, as stated by this Court in Hanson v. Denkla, 357 U.S. 235, 253, reh'g denied, 358 U.S. 858 (1958):

> the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State . . . It is essential in each case that there be some act by which the defendant purposefully

> avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

This principle is designed to protect a defendant from being haled into a jurisdiction as a result of "random, fortuitous, or attenuated contacts." Burger King, supra, 471 U.S. at 475.

B. The reasoning of McGee v. International Life Insurance Co. as applied to a commercial primary insurer should not be applied as to a state-created unincorporated guaranty association with statutorially imposed limited guaranty obligations designed to protect the residents of South Carolina.

It is clear from the record below that SCIGA does not transact any business in Alabama, has no office or service agent in Alabama, and has no contacts with the State of Alabama whatsoever. In spite of SCIGA's clear lack of minimum contacts with the State of Alabama, however, the Eleventh Circuit has held that assumption of insurance obligations in a state may result in jurisdiction because of the

reasoning of McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). Clearly, McGee is distinguishable since it involved a commercial insurer who did indeed have a presence in the forum, and since it issued a policy of reinsurance and corresponded with the insured, directly, by mail in order to collect premiums. In contrast here, SCIGA had no presence in Alabama, no property or employees, collected no assessments, and had no direct dealings or privity with the insured as did the reinsurer in McGee.

The sole contact between SCIGA and the forum was its limited statutory obligation on a potentially covered claim and the legal fiction that it could be deemed the insurer. As noted by Judge Johnson in his dissent, however, "[t]hese statutory provisions relate only to substantive insurance obligations." 754 F.2d at 1560. SCIGA has in no way assumed all of

the obligations under the policy. The statute itself imposes restrictions on what claims are to be covered. For example, Section 38-31-60(a) of the Act states that an obligation under most claims is limited to $300,000.00 or less. In addition, only certain types of insurance claims are covered. Life insurance, title insurance, surety insurance, accident and health insurance, mortgage guaranty insurance and ocean marine insurance are not covered by the Act. Thus, simply because a primary insolvent insurer has issued a policy covering a certain risk, SCIGA is not necessarily obligated for payment of the claim associated with such risk. Furthermore, even if a claim is covered, the obligation of the Guaranty Association is reduced by the amount of recovery received from another guaranty association who may also be responsible under the claim. S. C. Code Ann. § 38-31-100(2). Thus, SCIGA's obligation of insurance can

certainly not be compared to that of a primary insurer or the commercial reinsurer in McGee (who was in privity with the insured) as it is, or may be, limited by a number of factors.

Moreover, the limited obligations of the Association that have been assumed from the primary insurer are assumed by statute, not by contract. Unlike a commercial guarantor, SCIGA received no consideration for the act of guarantee, and the Association had no ability to assess the risks associated with the primary insurer's various policies of insurance. The McGee case so heavily relied on by the Eleventh Circuit, by contrast, involved a primary insurer who, unlike SCIGA, not only was able to assess the risks associated with assuming a policy covering California risks, but also derived economic benefit by doing so. The insurer in the McGee case contractually assumed risks in the foreign state for the purpose of making a profit, thereby deriving a direct

benefit from a resident of that state. In assuming the policy, the insurer in the McGee case even sent personal notice of reinsurance to the insured in the foreign state, and received direct payment of premiums from the insured. McGee, supra, 2 L.Ed.2d at 225. It would certainly be reasonable to conclude that the insurer in McGee thus "purposefully directed" activities towards the forum state of California in its contractual assumption of the policy and its continued solicitation of business directly from the insured.

SCIGA, on the other hand, has derived no benefits whatsoever from the State of Alabama. Although it was argued that SCIGA is funded by a portion of the premiums that were written by Midland Insurance Company, this is not necessarily true. The South Carolina Act requires that member insurers pay obligations and expenses incurred by the Association based

on the portion of premiums written in South Carolina only when assessed. See, S. C. Code Ann. § 38-31-60(c). There is no "fund" per se set up by the Association and there could be no assessment from Midland for this claim since any such assessments would come after the fact. When the Association pays a claim, an assessment of its member insurers is made. Midland Insurance Company has been in bankruptcy for a number of years, and Olivier has never made a showing that Midland Insurance Company actually was assessed to pay this claim during any time period relevant to this case.

C. Personal jurisdiction should not be imposed upon SCIGA simply because of the foreseeability that a claim may arise in a given jurisdiction.

In reality, SCIGA has no contacts whatsoever with the State of Alabama other than the mere possibility of foreseeability of suit arising in foreign fora. "'Foreseeability' alone has never been a sufficient benchmark for

personal jurisdiction under the Due Process Clause." World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286, 295 (1980). Thus, if the reasoning of the Eleventh Circuit majority is allowed to stand, it would set forth the principle of law that a non-profit state guarantor may be subject to suit in any state to which the insured fortuitously travels. Such a result is completely repugnant to the reasoning set forth in International Shoe and its progeny.

The finding of jurisdiction under the facts of this case is thus contrary to this Court's requirement that a defendant must purposefully avail itself of conducting activities within the foreign state. How can it possibly be said that SCIGA has "purposefully directed" activities towards the State of Alabama by having assumed limited insurance obligations of a primary insurer, when the Association is a nonprofit statutorily created entity which

enters into no contracts of insurance or guaranty in any state whatsoever? There is an obvious distinction between a contractual guaranty involving the ability to choose where to assume obligations directly with the insured, as in the McGee case, and a statutory obligation with no privity with the insured, as is involved here.

D. The Legislation creating SCIGA does not indicate any intention to be sued outside of the State of South Carolina and SCIGA has not consented to the imposition of jurisdiction by a foreign forum.

Not only has SCIGA not deliberately directed any activities toward the state of Alabama nor purposefully availed itself of the privilege of conducting business in Alabama, but SCIGA also has not in any way consented to personal jurisdiction within the State of Alabama. The Court below points to no authority by which SCIGA has consented to be sued in Alabama, and no such authority or legislative consent exists.

The South Carolina statute was intended to benefit residents and insureds of South Carolina, and it is clear that the South Carolina Act, as well as other state guaranty association acts, have intended their own state's administrative and legal system to be the operative means by which these insurance claims are brought. Indeed, the only way to properly determine otherwise would be to certify the question to the Supreme Court of South Carolina (as the Appellate Court below refused to do).

The South Carolina statute provides certain priority provisions which are designed to prevent double recovery in the event more than one guaranty association may be responsible on a given claim. S. C. Code Ann. § 38-31-100(2). A close reading of these provisions shows that recovery in the context of a workmen's compensation claim, for example, must be sought first from the association of

residence of the claimant. Thus, the statute clearly dictates that recovery must first be had in another jurisdiction before coming to South Carolina, particularly if the "Workmen's Comp." caption on the Midland policy is controlling. These priority provisions indicate that the South Carolina Legislature intended SCIGA to be sued in its own forum. But the Appellate Court, having ruled that jurisdiction over SCIGA may be obtained in virtually any state, has effectively removed important determinations of this nature from the South Carolina legislature or legal system.

Moreover, determinations must be made as to whether a claim is covered, the extent of the covered claim, whether a claim has been brought timely under the provisions of the South Carolina Act, whether another guaranty association is partially responsible for the claim, and numerous other procedural and

substantive issues. It is interesting to note that the Court below in deciding the personal jurisdiction question has apparently made its own determination as to whether Olivier's Jones Act suit is in fact a "covered claim" within the scope of the South Carolina Act. There has been no decision on that question by the trial court, and it is SCIGA's position that such a claim is not a "covered claim" as it may be within the ocean marine exclusion provisions of the South Carolina Act. These determinations made by other courts indicate some of the problems associated with removing these types of substantive issues from the province of SCIGA and the South Carolina courts. As a result of the Appellate Court's holding, a court sitting in Alabama could determine whether or not Olivier's claim is covered under the South Carolina Act, who has priority as between LIGA and SCIGA, and whether SCIGA

assets may be garnished. These matters should rest with the Guaranty Association and the courts of the state that created it. Likewise, the South Carolina Act, like other state insurance guaranty acts, requires the Commissioner of Insurance to review actions of the Association. This mechanism will be disrupted by the Eleventh Circuit holding in this case.

The court below has erred in determining that assumption of insurance obligations in a state, without a jurisdictional presence, will have the effect of submitting to jurisdiction. It may be reasonable to say that a commercial insurer, who may assess risks, knowingly evaluate what areas in which it wishes to operate, and adjust its premiums accordingly to compensate for the risks associated with a given state, may be subject to suit in a state in which a risk happens to materialize--particularly if it collects

premiums and engages in business there. When applied to a nonprofit unincorporated association like SCIGA and other state guaranty associations, however, this analysis is inappropriate and should be rejected. Nothing in the South Carolina Guaranty Act indicates that the South Carolina legislature intended that SCIGA, in assuming the limited financial obligations of the primary insurer, would also be subject to suit wherever the primary insurer might be found. No waiver of SCIGA's due process rights can reasonably be inferred from SCIGA's statutory financial obligations.

II.

THE DECISION IN THE ELEVENTH CIRCUIT BELOW IS CONTRARY TO THE MOST RECENT DECISION OF THIS COURT ON THE EXTENT OF QUASI IN REM JURISDICTION

Although the minimum contacts analysis is applied whether the case is in personam or, as here, quasi in rem, the law is clear that a fiction alone is insufficient to establish

jurisdiction. Thus, where a contractual obligation is attached as a garnishable res, it is still required that the garnishee must have engaged in purposeful or voluntary activity in the formum sufficient to justify jurisdiction. Rush v. Savchuk, 444 U.S. 320, 62 L. Ed. 2d 516, 100 S. Ct. 571 (1980). Thus, the Eleventh Circuit should be reversed since its decision is contrary to the most recent jurisdictional standards stated by this Court, particularly in Savchuk, and unless the Supreme Court applies a uniform rule whether insurance guaranty associations are subject to suit outside of state (uniformity is also presented in the nearly identical statutes
adopted by the associations interested in this suit, and the others, since most of these laws are based on the Insurance Guaranty Association Model Act, Olivier, supra, 954 F.2d at 1555 n.2.), the result in the Eleventh Circuit will wreak havoc on the insurance industry and, as

the dissent below observed, could well indeed jeopardize the existence of insurance guaranty associations by virtue of increased expenses of litigation in foreign fora.

> The social goal of aiding claimants and insureds of insolvent insurors will be disserved, and perhaps even defeated, by forcing the guaranty associations to expend a large share of their resources defending in foreign fora rather than actually satisfying covered claims.

Olivier, supra, 954 F.2d at 1563 (dissent).

III.

THE DECISION OF THE ELEVENTH CIRCUIT BELOW IS CONTRARY TO TRADITIONAL NOTIONS OF RESERVED POWERS OF THE STATES AND THE FULL FAITH AND CREDIT CLAUSE

For the Eleventh Circuit to disregard the South Carolina statutes which, nowhere, consent for SCIGA to be sued out of state, was an unconstitutional encroachment on the power reserved to the Legislature of the State of South Carolina. It is elementary constitutional law that there are attributes of

sovereignity attaching to every state which may not be impaired by the federal government by virtue of Amendment X. Thus, amenabilty to suit outside South Carolina may not be imposed by the federal government, absent consent from the South Carolina Legislature, since this is a matter reserved to the interested state. Amendment X specifically reserves powers of this nature unless specifically delegated by the U. S. Constitution or by the interested state.

The effect of the South Carolina statutes on its state-created insurance guaranty entity, as applied in an out-of-state forum, also involves concepts of comity or full faith and credit. Thus, the Eleventh Circuit below should also be reversed for failure to recognize and give effect to the provisions of the South Carolina statutes which "indicate a desire on the part of

. . . SCIGA to be sued only in their own fora." Olivier, supra, 954 F.2d at 1562 (dissent).

IV.

THE EFFECT OF THE ELEVENTH CIRCUIT DECISION WOULD BE SEVERE ON ALL STATE GUARANTY ASSOCIATIONS

The issues involved in this case are of importance to every state guaranty association. It is likely that all state guaranty associations have numerous insurers within their membership that issue policies insuring risks throughout the United States. Unless reversed, the Eleventh Circuit decision will require that any state guaranty association could be subject to suit in any jurisdiction in the United States simply because a given claim may have arisen in such jurisdiction. Such a finding of jurisdiction based on a fortuity -- the unilateral acts of a particular plaintiff -- and a legal fiction

that the guarantee is a res whch can be attached, is contrary to the Constitution and traditional interpretations of the Due Process Clause of the Fourteenth Amendment.

Subjecting SCIGA, or for that matter, any other guaranty association to unlimited fora would impose a result that cannot be said to have been fairly intended by any of the state legislatures involved. As stated by Judge Johnson in the dissent:

> The majority underestimates the scope and magnitude of the effect its holding will have on insurance guaranty associations. As non-profit creatures of statute designed to benefit in-state claimants and insureds, they will have to raise relatively substantial sums of money, in what may become a large number of cases, to hire attorneys in foreign jurisdictions and pay other costs of defense in foreign fora. The social goal of aiding claimants and insureds of insolvent insurers will be disserved, and perhaps even defeated, by forcing the guaranty associations to expend a large share of their resources defending in foreign fora rather than actually satisfying covered claims.

Olivier, supra, 954 F.2d at 1562-1563.

It is indeed constitutionally improper to remove claims asserted against these guaranty associations from the province of their creating state and such a result should not be sanctioned by this Court.

CONCLUSION

Based on the foregoing, the Petition for Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served upon counsel for all parties to this proceeding by mailing three copies of the same by United States Mail, first class postage prepaid, on this the 4th day of June, 1992 as follows:

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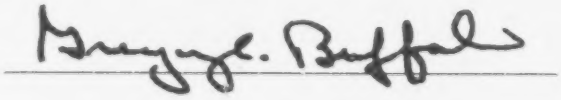

91-1984

Supreme Court, U.S.
FILED
JUN 4 1992
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Petitioner,

v.

SHERMAN J. OLIVIER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX OF PETITIONER

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APPENDIX A

Sherman J. OLIVIER, Plaintiff-Appellant,

v.

MERRITT DREDGING COMPANY, INC., South Carolina Property and Casualty Insurance Guaranty Association, Louisiana Insurance Guaranty Association, Defendants-Appellees

No. 91-7078.

United States Court of Appeals, Eleventh Circuit.

March 6, 1992.

Appeal from the United States District Court for the Southern District of Alabama.

Before JOHNSON*, CLARK*, and PECK**, Senior Circuit Judges.

JOHN W. PECK, Senior, Senior Circuit Judge:

Sherman J. Olivier, a resident of Louisiana and a seaman injured aboard a vessel in Alabama, appeals the dismissal of writs of

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[Footnotes at page 38 et seq.]

garnishment issued to the Louisiana Insurance Guaranty Association [LIGA] and the South Carolina Property and Casualty Insurance Guaranty Association [SCIGA]. The district court in Alabama dismissed the writs on the ground that the court lacked personal jurisdiction over the garnishees. The court held that LIGA and SCIGA did not have sufficient minimum contacts with Alabama in order to be subject to personal jurisdiction within the state. Because we find that SCIGA and LIGA had sufficient minimum contacts with Alabama and we believe that judicial economy would best be served by keeping this litigation within that forum, we reverse the district court's order.

I. FACTS

On August 1, 1983 Sherman J. Olivier sustained personal injuries while employed by the Merritt Dredging Company [Merritt] as a

sailor aboard a vessel in Alabama on the Alabama River. At the time of his injuries, Olivier was a resident of Louisiana. Merritt was a South Carolina corporation with its principal place of business in South Carolina.

On March 30, 1984 Merritt filed for bankruptcy in South Carolina. In order to protect the bankruptcy estate, the bankruptcy court temporarily stayed the personal injury suit Olivier had brought against Merritt in Alabama. The bankruptcy court lifted its stay on September 26, 1985.

To provide insurance for its various operations including its activity in Alabama, Merritt contracted with the Midland Insurance Company [Midland]. Like Merritt, Midland faced financial difficulties. On April 3, 1986 Midland, a New York corporation, was liquidated pursuant to an order of the Supreme Court of New York. The liquidation proceedings once again stayed Olivier's personal injury suit

against Merritt.

The second stay was lifted on May 22, 1987. In December 1988 a jury in Alabama awarded Olivier $507,340.00. On February 14, 1989 Olivier received a judgment against Merritt of $522,190.00, interest from the date of the judgment, and costs.

Due to the insolvency of both Merritt and its insurer, Midland, Olivier requested that the district court in Alabama issue writs of garnishment to LIGA, SCIGA, and the Alabama Insurance Guaranty Association [AIGA]. On July 21, 1989 the district court issued the writs.

AIGA, LIGA, and SCIGA are unincorporated associations created by state statutes. *See* Ala.Code §§ 27-42-1 *et seq.* (1975), La.Rev.Stat.Ann. §§ 22:1375 *et seq.* (West Supp.1991), S.C.Code Ann. §§ 38-31-01 *et seq.* (Law.Co-op.1976).[2] The AIGA writ is not at issue in this appeal. The guaranty

associations were established for the purpose of avoiding financial loss or excessive delay in payment to claimants or policyholders due to the insolvency of an insurer. *See* La.Rev.Stat.Ann. §§22:1376, 22:1382, S.C.Code Ann. § 38-31-60; *see also Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 676 (2d Cir. 1990). Insurance companies that underwrite risks in the state in which the guaranty association exists are required to pay assessments necessary to fund the guaranty association. *See* La.Rev.Stat.Ann. §§ 22:1380, 22:1382, S.C.Code An. §§ 38-31-40, 38-31-60. Prior to its liquidation, Midland was subject to assessments by LIGA and SCIGA. Pursuant to LIGA's and SCIGA's motions, on December 21, 1990 the district court in Alabama dismissed the writs of garnishment it had previously issued on the ground that the court lacked personal jurisdiction over the

garnishees. Olivier appeals the district court's order of December 21, 1990.

II. DISCUSSION

A. ALABAMA LONG ARM JURISDICTION

[1,2] This circuit conducts *de novo* review of a district court's dismissal of an action for lack of personal jurisdiction. *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir.1990). We begin our inquiry into whether the district court properly refused to assert personal jurisdiction with a two-part analysis. First, we consider whether the district court could obtain personal jurisdiction over the defendants pursuant to the applicable state long-arm statute. Second, we consider whether the exercise of personal jurisdiction would violate the due process clause of the Fourteenth Amendment to the United States Constitution.

In interpreting the reach of the state's long-arm statute, the Supreme Court of Alabama has extended the jurisdiction of Alabama courts to the extent permissible under the due process clause of the Fourteenth Amendment. *See Alabama Waterproofing Co., Inc. v. Hanby*, 431 So.2d 141, 145 (Ala.1983). Thus, in order to determine whether the district court in Alabama properly refused to exercise personal jurisdiction, we need only consider whether the exercise of jurisdiction would have satisfied the requirements of due process.

B. DUE PROCESS

[3] The determination of whether a district court can exercise personal jurisdiction over a non-resident defendant is itself a two-part inquiry. In the first prong of our due process inquiry, we consider whether the defendants, LIGA and SCIGA, engaged in

minimum contacts with the State of Alabama. In the second prong of our inquiry, we consider whether the exercise of personal jurisdiction over the defendants would offend "traditional notions of fair play and substantial justice." *Madara*, 916 F.2d at 1516 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct 154, 158, 90 L.Ed. 95 (1945)).

1. Minimum Contacts

In analyzing the parties' arguments we are guided by the language of several recent Supreme Court opinions. As the Supreme Court has stated:

> [M]inimum-contacts analysis presupposes that two or more States may be interested in the outcome of a dispute, and the process of resolving potentially conflicting "fundamental substantive social policies" can usually be accommodated through choice-of-law rules rather than through outright preclusions of jurisdiction in one forum. (citations omitted) *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483 n. 26, 105 S.Ct. 2174, 2188 n. 26, 85 L.Ed.22d 528 (1985).

In 1989 Olivier, a resident of Louisiana, received a judgment in Alabama (the place where he sustained his injuries) against Merritt, a South Carolina corporation. Olivier contends that the judgment entitled him to proceed against Merritt's bankrupt insurer, Midland. Olivier maintains that his claim is a "covered claim" within the meaning of the Louisiana and South Carolina statutes governing the respective state insurance guaranty associations; Midland is an insolvent insurer and the claimant or insured was a resident of either Louisiana or South Carolina at the time of the insured event. *See* La.Rev.Stat.Ann. § 22:1379(3)(a)[3], S.C.Code Ann. § 38-31-20(6)[4].

Furthermore, Olivier argues that since his claim is a "covered claim", according to the respective statutes LIGA and SCIGA are deemed insurers to the extent of Midland's obligations. *See* La.Rev.Stat.Ann. §§ 22:1382

A(1) and (2)[5], S.C.Code Ann. §§ 38-31-60(a) and (b)[6].

Olivier contends that Midland is subject to personal jurisdiction in Alabama because it provided insurance coverage for Merritt for accidents that occurred while operating its vessel in Alabama waters. By guaranteeing payment of Midland's policies that provided insurance for claimants who are state residents or insureds who are state residents, Olivier contends LIGA and SCIGA should reasonably have foreseen that they would be subject to suit in other jurisdictions. Olivier claims that the statutes, which place LIGA and SCIGA in the position of an insolvent insurer, impose affirmative, extraterritorial obligations upon them. Because Midland is subject to personal jurisdiction in Alabama, Olivier argues that both LIGA and SCIGA are subject to personal jurisdiction in Alabama as well. Olivier argues that LIGA's and SCIGA's statutory

obligations establish minimum contacts with Alabama sufficient to justify the district court's exercise of personal jurisdiction over them.

As mere creations of their respective state statutes, LIGA and SCIGA claim they have not purposefully directed any activity toward the State of Alabama. Neither LIGA nor SCIGA maintains any offices or agents in Alabama. The associations contend that Midland's contacts with Alabama are not at issue since personal jurisdiction is not being sought after Midland, but after LIGA and SCIGA. LIGA and SCIGA claim that they will be denied due process if they are subject to legal liability in Alabama on account of the unilateral activity of a third party---Midland.

In addition, LIGA and SCIGA argue that although it might have been foreseeable that the associations could become involved in

litigation in Alabama, such foreseeability alone is insufficient to confer personal jurisdiction. LIGA and SCIGA maintain that foreseeability is only one factor to be considered in an analysis of a defendant's minimum contacts with a forum.

LIGA and SCIGA note that neither of the state insurance guaranty acts specifically authorizes suit against an insurance guaranty association outside the state which created the association. The associations argue that this conspicuous absence indicates that it was not the intent of the state legislatures to permit LIGA and SCIGA to be subject to suit in other jurisdictions.

In support of their arguments, LIGA and SCIGA rely upon the reasoning of the district court in *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 715 F.Supp. 94, 97 (S.D.N.Y.1989); *aff'd on other grounds*. 896 F.2d 674 (2d Cir.1990). We are not persuaded

by the court's reasoning in *Rhulen*. Indeed, we believe the district court decision concerning personal jurisdiction over AIGA and other state insurance guaranty associations is entitled to no weight since the Second Circuit held that the district court lacked subject matter jurisdiction; this holding precluded any consideration of the existence of personal jurisdiction over the defendants. *Rhulen*, 896 F.2d at 675-676.

For the reasons outlined below we believe Olivier has the superior argument. In the seminal case, *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, the Supreme Court of the United States held that the due process clause of the Fourteenth Amendment requires that a defendant be subject to the personal jurisdiction of the court. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 564, 62 L.Ed.2d 490 (1980). Thus, we recognize that

even if the forum state is the most convenient location for litigation, the due process clause may act to divest a state's courts of the power to render a valid judgment if a defendant does not have the requisite minimum contacts with the forum. *World-Wide Volkswagen*, 444 U.S. at 294, 100 S.Ct. at 566; *Hanson v. Denckla*, 357 U.S. 235, 251, 254, 78 S.Ct. 1228, 1238, 1240, 2 L.Ed.2d 1283 (1958).

[4] The Supreme Court has opined that the due process clause of the Fourteenth Amendment requires that defendants have "fair warning" that particular activities may subject them to the jurisdiction of foreign sovereigns. *Burger King*, 471 U.S. at 472, 105 S.Ct. at 2182. One of the considerations important in assessing whether or not a defendant has fair warning is the foreseeability of suit within the jurisdiction. The foreseeability that is critical in an analysis of minimum contacts is whether "the defendant's conduct and connection

with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567. In attempting to define when a defendant should reasonably anticipate being haled into court, the Supreme Court has stated " . . . there must be some act by which the defendant purposefully availed itself of conducting activities within the forum state." *Hanson*, 357 U.S. at 253, 78 S.Ct. at 1239-1240. This requirement exists to ensure that a defendant will not be subject to legal liability in a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. *Burger King*, 471 U.S. at 475, 105 S.Ct. at 2183.

[5] In the instant case, LIGA and SCIGA are subject to legal liability in Alabama neither on account of random contacts nor on account of the unilateral activity of Midland Insurance. We hold that the acts of

guaranteeing insurance obligations within the state and of assuming the role of insurer are of such a nature that they justify the legal fiction that LIGA and SCIGA have consented to service of process and suit in Alabama. *Cf. International Shoe*, 326 U.S. at 318, 66 S.Ct. at 159.

LIGA and SCIGA guaranteed payment of "covered claims". *See* La.Rev.Stat.Ann. § 22:1379(3)(a), S.C.Code Ann. § 38-31-20(6). The "claimant", Olivier, was a Louisiana resident. The "insured", Merritt, was a South Carolina corporation. The insurance company, Midland, was an "insolvent insurer" authorized to transact business in Louisiana and South Carolina at the time of Olivier's accident. In Alabama, the state in which he suffered injuries, Olivier received a judgment against Merritt. Because neither Merritt nor its insurer, Midland, could meet its obligations to the appellant, Olivier proceeded against the

associations that guaranteed payment.

Not only did LIGA and SCIGA guarantee payment of "covered claims", but they also assumed all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. *See* La.Rev.Stat.Ann. § 22:1382 A(2), S.C.Code Ann. § 38-31-60(b). By the language of the statutes that govern LIGA and SCIGA, we find that these associations had fair warning that they could be subject to suit for "covered claims" in jurisdictions outside of their respective states.

[6] LIGA and SCIGA assessed Midland in order to have sufficient funds to guarantee "covered claims". Midland insured Merritt's operations in Alabama. By serving as guarantors of Midland's obligation to Olivier, LIGA and SCIGA purposefully availed themselves of conducting activities within Alabama. Indeed, since the Supreme Court's decision in *McGee v. International Life Ins. Co.*, 355

U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957), it has been the law that when a party assumes insurance obligations in a state in which it has no other business, the party has submitted to the jurisdiction of the state's courts.

In reaching our conclusion we draw upon the holding of the Supreme Court of Alabama in *Keelean v. Central Bank of the South*, 544 So.2d 153 (Ala.1989). In *Keelean*, non-resident defendants guaranteed payment of a promissory note of a foreign corporation issued to an Alabama bank. Even though the defendants signed the guaranties outside of Alabama, the court held that the guarantors should have foreseen in the event of a default the effects of their guaranties in the State of Alabama. The court concluded that execution of the guaranties constituted sufficient minimum contacts required by the due process clause. *Keelean*, 544 So.2d at 157-158.

Moreover, other courts of appeals have reached conclusions similar to the one we reach today. In *Forsythe v. Overmyer*, 576 F.2d 779 (9th Cir.1978), *cert denied*, 439 U.S. 864, 99 S.Ct. 188, 58 L.Ed.2d. 174 (1978), the Ninth Circuit held that a non-resident third party's personal guaranty of a lease contract to be executed in California constituted minimum contact sufficient to subject the third party to the jurisdiction of California courts. *Forsythe*, 576 F.2d at 783-784. *See also National Can Corp. v. K Beverage Co.*, 674 F.2d 1134, 1137 (6th Cir.1982); *Marathon Metallic Bldg., Co. v. Mountain Empire Constr. Co.*, 653 F.2d 921, 923 (5th Cir. Unit A Aug. 1981).

We conclude that the associations' obligations to defend suits in other jurisdictions would not be unduly burdensome. Indeed, both LIGA and SCIGA may alleviate the cost of litigation in other jurisdictions by adjusting their insurance assessments. Or if

the expenses are too great, they have the option of altering their obligations and coverage for claims. *Cf. World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567.

2. Fair Play and Substantial Justice

[7] Once a court has decided that a defendant has established minimum contacts within a forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *Burger King*, 471 U.S. at 476, 105 S.Ct. at 2184. As the Supreme Court has stated, other factors may serve to establish the reasonableness of personal jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *Burger King*, 471 U.S. at 477, 105 S.Ct. at 2184. Some of these factors include: the plaintiff's interest in obtaining convenient

and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *Id.*

In addition, as the Supreme Court of the United States has noted " . . . modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee*, 355 U.S. at 222-223, 78 S.St. at 201. The Supreme Court subsequently stated that the historical developments noted in *McGee* have only accelerated in the generation since that case was decided. *World-Wide Volkswagen*, 444 U.S. at 293, 100 S.Ct. at 565. By guaranteeing payment of an insurance claim that arose out of an accident in Alabama and that went to judgment within the State, LIGA and SCIGA engaged in economic

activity in Alabama. Due to the effects of their economic activity within the State, requiring LIGA and SCIGA to adjudicate in Alabama is not a substantial burden.

It would be unduly burdensome, however, to require Olivier to seek coverage for his claim from LIGA in Louisiana courts and from SCIGA in South Carolina courts. Such a requirement would spread thin his resources and would hamper Olivier's ability to obtain quick, convenient, and effective relief. *See McGee*, 355 U.S. at 223, 78 S.Ct. at 201. Indeed, it would frustrate the very purposes of the state insurance guaranty associations. *See e.g.* La.Rev.Stat.Ann. § 22:1376. Furthermore, a requirement that Olivier sue in both Louisiana and South Carolina would pose an unnecessary waste of precious judicial resources. Separate litigations do not necessarily insure fairness; in this case they would inhibit it.

III. CONCLUSION

For the reasons stated above we REVERSE the order of the district court and REMAND the case for further proceedings consistent with this opinion.

JOHNSON, Senior Circuit Judge, dissenting:

Prior to today, the particular issue in this case whether personal jurisdiction over an out-of-state insurance guaranty association is consistent with due process, had not yet been resolved by any United States Court of Appeals. As of today, the issue continued to await a correct resolution. In my opinion, the majority overrates the less-than-minimum contacts of LIGA and SCIGA to Alabama and further exacerbates this error by misconstruing the traditional notions of fair play and substantial justice. Olivier clearly fell short of his burden of justifying the exercise of personal jurisdiction over these non-profit

creatures of foreign state legislation. *See Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 490 (5th Cir.1974) (the burden of proving personal jurisdiction is on the plaintiff).

1. *Minimum Contacts*

The majority finds sufficient minimum contacts in two acts taken by LIGA and SCIGA: (1) "guaranteeing insurance obligations *within the state* " of Alabama (emphasis added) and (2) "assuming the role of insurer." There are three flaws in the majority's finding. My first two objections relate to the majority's characterizations of the enabling statutes. My final criticism of the majority's finding of minimum contacts relates to its analytical focus.

First, the majority's assertion that LIGA and SCIGA guarantee "insurance obligations within" Alabama constitutes an imprecise interpretation of the statutes at issue because it implies that the statutes focus, at least to

some degree, on Alabama. In order for a claim to be "covered" under the statutes, either (1) the claimant or the insured must reside in the state which established the insurance guaranty association, or (2) the property giving rise to the claim must be permanently located in the state which established the insurance guaranty association. La.Rev.Stat.Ann. § 22:1379(3)(a) (West Supp.1991); S.C.Code Ann. § 38-31-20(6) (Law.Co-op.1990). Consequently, although it is technically true that LIGA and SCIGA guarantee insurance obligations within Alabama, they do so only because a covered claim could rise in *any* state, as long as one connection exists between the state which created the insurance guaranty association and either the plaintiff, the insured, or the property giving rise to the claim.[1]

Second, the majority's reliance on the provisions which mandate LIGA and SCIGA's assumption of the role of the insurer exalts

form over substance. *See* La.Rev.Stat.Ann. § 22:1382(A)(2) (West Supp.1991) ("The association shall [b]e deemed the insurer to the extent of its obligations on the covered claim . . . ."); S.C.Code Ann. § 38-31-60(b) (Law.Co-op.1990) ("The Association . . . is considered the insurer to the extent of its obligation on the covered claims . . . ."). These statutory provisions relate only to substantive insurance obligations; to interpret them as mandating that LIGA and SCIGA shall always be deemed or considered to be the insurer for purposes of personal jurisdiction attributes an unreasonably broad scope to these provisions.

Finally, the majority's minimum contacts analysis reflects an undue focus on foreseeability. *See ante* at 1557. Foreseeability ought not to be the sole focus of the due process analysis. Rather, this Court must also find that LIGA and SCIGA

"'purposefully directed'" their activities at Alabama. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 2181, 85 L.Ed.2d 528 (1985). *I.e.*, LIGA and SCIGA must have "'purposely derive[d] benefit'" from their Alabama contacts, *id.* at 473, 105 S.Ct. at 2183, or "manifestly . . . availed [themselves] of the privilege of conducting business [in Alabama] shielded by 'the benefits and protections' of [Alabama] laws," *id.* at 476, 105 S.Ct. at 2184. The contacts relied on by the majority clearly fail to establish such purposeful availment by LIGA and SCIGA. Rather, those contacts are "'random, fortuitous,' [and] 'attenuated,'" *id.* at 475, 105 S.Ct. at 2183. (citations omitted), and, as such, they are insufficient to justify an exercise of personal jurisdiction.[2] Furthermore, fairly read, these provisions indicate an intent to bestow benefit upon only in-state claimants and insureds, thus negating

any inference that LIGA and SCIGA purposefully subjected themselves to the benefits of Alabama law.

The remainder of the majority's evaluation of minimum contacts further obfuscates the purposeful availment requirement. The majority asserts that, because both LIGA and SCIGA assessed dues against Midland and Midland insured a risk in Alabama, purposeful availment exists under the reasoning of *McGee v International Life Insur. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), involving a defendant who was a primary insurer, and four other cases involving defendants who were private guarantors. All of those cases, however, are clearly distinguishable from the one at bar. First, in all five cases, the defendant was aware that an occurrence of the insured risk or a default on the guaranteed note would have effects in the forum state. *See McGee*, 355 U.S. at 223, 78 S.Ct. at 201;

National Can Corp. v. K Beverage Co., 674 F.2d 1134, 1137 (6th Cir.1982); *Marathon Metallic Bldg. co. v. Mountain Empire Constr. Co.*, 653 F.2d 921, 923 (5th Cir. Unit A Aug. 1981); *Forsythe v. Overmyer*, 576 F.2d 779, 781-83 (9th Cir.), *cert. denied*, 439 U.S. 864, 99 S.Ct. 188, 58 L.Ed.2d 174 (1978); *Keelean v. Central Bank of the South*, 544 So.2d 153, 157 (Ala. 1989). In the case *sub judice*, it was merely foreseeable rather than actually foreseen that, if Midland generated a covered claim, it could arise in Alabama. Moreover, in all but one of the majority's cases, the court attributed a profit-motive to the establishment of contacts with the forum state by the defendant, a private person or entity. *See McGee*, 355 U.S. at 221-23, 78 S.Ct. at 200-01; *National Can*, 674 F.2d at 1137; *Marathon Metallic*, 653 F.2d at 923; *Forsythe*, 576 F.2d at 781-83.[3] Unlike the cases relied on by the majority, the case at

bar involves non-profit creatures of statute,[4] formed solely to aid beneficiaries of policies issued by insolvent insurers,[5] in which membership is compulsory for insurers who wish to do business in the state that created the insurance guaranty association,[6] whose funds are derived solely from premiums written in the state which created the association,[7] and whose assessments against member insurers do not reflect an evaluation of risk, but rather are simply proportional to the particular member's share of the total amount of premiums written in the state that created the association.[8] Because the insured in this case, Merritt, was a South Carolina corporation, a portion of the premiums it paid to Midland went toward funding SCIGA---*i.e.*, SCIGA received funding directly related to the insurance policy that covered the Alabama tort which gave rise to the instant action. LIGA, however, received no additional funds as a

result of the policy at issue in this case although it did benefit to the extent that Midland paid LIGA a portion of its premiums from Louisiana insureds, but those Louisiana insureds have absolutely no connection to this litigation. Neither SCIGA nor LIGA can be said to have purposefully availed themselves of the benefits of Alabama law merely by receiving money from Midland, who coincidentally insured the Alabama tort; this money in no way reflected an evaluation of the Alabama risks under the Merritt policy or an effort to profit from Midland's insurance of risks in Alabama.

Moreover, the priority provisions of the guaranty statutes (which the majority ignores) also negates a finding of purposeful availment. These provisions specify, in cases where more than one guaranty association may be liable, from which association the claimant must seek recovery first. La.Rev.Stat.Ann. § 22:1386(B) (West Supp.1991); S.C.Code Ann.

§ 38-31-100(2) (Law.Coop.1990).[9] Olivier argued that these provisions clearly imply that LIGA and SCIGA anticipated being haled into foreign fora. The more likely explanation, however, posits that LIGA and SCIGA expected that the claimant would exhaust his remedy against the association that is required to be sued first in its state's forum, then pursue a remedy against the next association in its state's forum and so on. Rather than purposeful availment, the priority provisions indicate a desire on the part of LIGA and SCIGA to be sued only in their own fora.

I therefore believe that LIGA and SCIGA lack minimum contacts with Alabama.

2. *Fair Play and Substantial Justice*

Olivier would still be entitled to a reversal, notwithstanding his insufficient showing on the minimum contacts prong, if he had made an exceptionally strong showing that an exercise of personal jurisdiction over LIGA

and SCIGA would be consistent with fair play and substantial justice. *Sun Bank, N.A. v. E.F. Hutton & Co.*, 926 F.2d 1030, 1034-35 (11th Cir.1991). This he failed to do. Fair play and substantial justice connote five factors: (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interests of the several states in furthering fundamental substantive social policies. *Burger King*, 471 U.S. at 476-77, 105 S.Ct. at 2184-85.

In the case at bar, the first and fifth factors converge and weigh heavily against the majority's holding. The majority asserts that any burden placed on the insurance guaranty associations and the social policy they serve may be alleviated by raising assessments or

reducing coverage of claims. *See ante* at 1559.[10] The majority further claims that Olivier's interest (the third factor) and the fifth factor are intertwined such that a failure to find personal jurisdiction over LIGA and SCIGA will "frustrate the very purposes of the state insurance guaranty association." *See ante* at 1559. The majority underestimates the scope and magnitude of the effect its holding will have on insurance guaranty associations. As non-profit creatures of statute designed to benefit in-state claimants and insureds, they will have to raise relatively substantial sums of money, in what may become a large number of cases, to hire attorneys in foreign jurisdictions and pay other costs of defense in foreign fora. The social goal of aiding claimants and insureds of insolvent insurers will be disserved, and perhaps even defeated, by forcing the guaranty associations to expend a large share of their

resources defending in foreign fora rather than actually satisfying covered claims.

Returning to the plaintiff's interest in obtaining convenient and effective relief, the majority is unwilling to force Olivier to pursue his claims in Louisiana (his home state) and South Carolina. However, such litigation is not likely to be significantly more difficult or costly in those fora because the issues are primarily of a legal rather than a factual nature. Furthermore, unless SCIGA fails to satisfy all of Olivier's allegedly covered claim, he will have to litigate in only one forum.[11] Perhaps the majority means to adopt Olivier's argument that, unless the court below has personal jurisdiction over appellees, he could be faced with a denial of coverage by each association in its own state courts. The fatal flaw in this argument is that it assumes that the court below will decide questions of Louisiana and South Carolina law contrary to

the way the Louisiana and South Carolina courts would. Surely, Olivier cannot have a legitimate interest in a forum based on the possibility that it will decide questions of foreign law erroneously.[12] Indeed, his only legitimate interest is in the efficiency of obtaining relief *if* it is due, not in obtaining a more favorable holding on the substantive law. *Burger King*, 471 U.S. at 477, 15 S.Ct. at 2184.

Harking back to the second factor, which the majority ignores, Alabama, the forum state, possesses only a relatively minor interest in supplying the forum for this case. The underlying tort occurred and was reduced to judgment in Alabama, but all the parties to the tort action and the garnishment action (with the exception of the Alabama Insurance Guaranty Association) hail from outside Alabama.

Finally, the interstate judicial system's interest in obtaining the most efficient

resolution of controversies might weigh in favor of a finding of personal jurisdiction in this case because judicial resources might be saved if Olivier were not faced with the *possibility* of having to seek garnishment against AIGA, LIGA, and SCIGA in three different fora to obtain complete satisfaction of his covered claim. However, this judicial efficiency argument squarely depends on Olivier's being unable to satisfy in full his allegedly covered claim against SCIGA.[13] This contingent interest in judicial efficiency cannot justify an exercise of personal jurisdiction in light of Olivier's insufficient showing on the other requirements of due process in the realm of personal jurisdiction.

For the foregoing reasons, I dissent.

FOOTNOTES

JOHN W. PECK, Senior, Senior Circuit Judge:

* *See* Rule 34-2(b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

** Honorable John W. Peck, Senior U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

2 Property and liability guaranty funds, such as AIGA, LIGA and SCIGA, have been established by law in each of the fifty states, the District of Columbia, Puerto Rico and the U. S. Virgin Islands. Most of these laws are based on the "Post-Assessment Property and Liability Insurance Guaranty Association Model Act" adopted by the National Association of Insurance Commissioners in December, 1969. *See generally Referenced Handbook on Insurance Company Insolvency*. 459 *et seq*. (Richard J. Marcus, ed., 2d ed. 1989).

3 The text of this section after amendments in 1987 does not differ materially from the text as it existed at the time of Olivier's accident and the date of insolvency of Midland Insurance. The current text reads as follows:

> "Covered claim" means an unpaid claim, including one for unearned premiums by or against the insured or agent, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance

policy to which this Part applies issued by an insurer, if such insurer becomes an insolvent insurer after September 1, 1970, and; (i) The claimant or insured is a resident of this state at the time of the insured event; or (ii) The property from which the claim arises is permanently located in this state.

4 For the sake of brevity, where the South Carolina statutes governing SCIGA do not contain any important differences from the Louisiana statutes governing LIGA, we have omitted from this opinion the texts of the South Carolina statutes.

5 The relevant portions of these sections read as follows:

A. The association shall:

(1)(a) Be obliged to the extent of the covered claims . . . .

(2) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent.

6 S.C.Code Ann. § 38-31-60(b) corresponds to LA.Rev.Stat.Ann. § 22:1382 A(2). The first sentence of the paragraph in the South Carolina Code is virtually identical to its Louisiana counterpart. The South Carolina Legislature, however,

added the following to paragraph (b) of § 38-31-60:

However, the Association has the right but not the obligation to defend an insured who is not a resident of this State at the time of the insured event unless the property from which the claim arises is permanently located in this State in which instance the Association does have the obligation to defend the insured.

JOHNSON, Senior Circuit Judge:

1 Indeed, this portion of the majority's reasoning smacks of the "stream of commerce" theory of minimum contacts that was rejected by a plurality of the Supreme Court in *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 108-13, 107 S.Ct. 1026, 1030-33, 94 L.Ed.2d 92 (1987).

2 In its discussion of fair play and substantial justice, the majority evidently refers to those contacts again when it asserts that LIGA and SCIGA engaged in "economic activity" in Alabama which had "effects" in Alabama. *See ante* slip opinion at 1500. LIGA and SCIGA engaged in no economic activity of any sort in Alabama. Further, the only effect that actions by LIGA and SCIGA may have had in Alabama is their own liability for the judgment obtained against Merritt in Alabama, and that is not an "effect" relevant to personal jurisdiction. The majority does not, and cannot, point to any sort of reliance induced or any other kind of effect in Alabama. LIGA and SCIGA

simply have had no meaningful impact on Alabama.

3 In the remaining case, *Keelean*, there was no finding regarding the defendants' collective motive behind providing the guaranty even though such a motive may legitimately be attributed to every private guarantor. Instead, the Alabama Supreme Court rested its holding, that the exercise of personal jurisdiction did not violate due process, on a flawed interpretation of *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). The *Keelean* court held that *Calder* established an "effects test" under which the exercise of personal jurisdiction is proper where the defendants should have foreseen the possible effect in the forum state in the event of a default on the guaranteed note. 544 So.2d at 157. However, the so-called 'effects test' described in *Calder* is much narrower and is applicable to neither *Keelean* nor the case at bar. The *Calder* court held that where defendants allegedly commit the *intentional* tort of libel, "expressly aimed at" a plaintiff in the forum state, *knowing* that the libelous material will have its greatest distribution in the forum state, the exercise of personal jurisdiction is justified. 465 U.S. at 789-90, 104 S.Ct. at 1486-88. Thus, the *Keelean* case is inapposite.

4 La.Rev.Stat.Ann. § 22-1380(A) (West Supp. 1991); S.C.Code Ann. § 38-31-40 (Law.Coop.1990).

5 La.Rev.Stat.Ann. § 22:1376 (West 1978); *see* S.C.Code Ann. §§ 38-31-60(b), 60(b) (Law.Co-op.1990).

6 La.Rev.Stat.Ann. § 22:1380(A) (West Supp. 1991); S.C.Code Ann. § 38-31-40 (Law.Co-op.1990).

7 La.Rev.Stat.Ann. §§ 22:1379(b)(6), 1382(A)(3)(a)(i) (West Supp.1991); S.C.Code Ann. § 38-31-20(9), 38-31-60(c)(iii) (Law Co-op.1990).

8 La.Rev.Stat.Ann. § 22:1382(A)(3)(a)(i) (West Supp.1991); S.C.Code Ann. § 38-31-60(c)(iii) (Law.Coop.1990).

9 The Louisiana and South Carolina provisions are identical.

10 Note that the majority erroneously considered this factor under the rubric of minimum contacts rather than reasonableness.

11 The priority provisions dictate that Olivier should seek coverage first from SCIGA because the insured, Merritt, was a South Carolina resident. *See* La.Stat.Ann. § 22:1386(B) (West Supp.1991); S.C.Code Ann § 38-31-100(2) (Law.Coop.1990).

12 *Cf. Burger King*, 471 U.S. at 483 n. 26, 105 S.Ct. at 2188 n. 26 (any conflict between state social policies should be resolved by choice of law principles; such conflict will not render an exercise of personal jurisdiction unreasonable).

13 *See supra* note 11.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

SHERMAN J. OLIVIER,	*	
	*	
Plaintiff,	*	
	*	CIVIL ACTION
NUMBER:		
v.	*	
	*	84-0890-B
MERRITT DREDGING CO., INC.,	*	
	*	
	*	
Defendant.	*	

ORDER

This matter is before the Court on the plaintiff's motion to reconsider this Court's order dismissing garnishees Louisiana Insurance Guaranty Association (LIGA) and South Carolina Property and Casualty Insurance Guaranty Association (SCGA). Upon reconsideration, it is hereby ORDERED that the Court's order of April 30, 1990, be and hereby is hereby VACATED and this order be SUBSTITUTED in its place.

Background

On July 21, 1989, writs of garnishment were

issued against LIGA and SCGA pursuant to affidavits filed by counsel for plaintiff Sherman J. Olivier (Olivier) alleging that the garnishees were believed to be indebted to defendant Merritt Dredging Company, Inc. (Merritt) or to have effects of Merritt in its possession or control.

This garnishment action arises from a personal injury suit filed by Olivier, against his former employer, Merritt, for injuries which he incurred on board a Merritt vessel during dredging operations on the Alabama River. Olivier, a resident of Louisiana was a seaman on the vessel at the time of his injury. On December 7, 1988, a jury returned a verdict in this case in favor of the plaintiff. On February 14, 1989, the Court entered final judgment in favor of the plaintiff in the sum of $522,190.00.

After the commencement of this action, but prior to trial, both Merritt and its insurer,

Midland Insurance Company (Midland), were placed in bankruptcy. At trial Merritt was represented by its excess insurer which has subsequently settled from this action. According to the plaintiff, an outstanding judgment amount of $469,645.95 remains. Consequently, the plaintiff has filed garnishments against both LIGA and SCGA under the theory that a portion of Midland's premiums were paid to them to protect claimants from the insurance company's insolvency. According to the plaintiff, both LIGA and SCGA are liable to Olivier as a claimant to insurance proceeds owed by Midland on behalf of Merritt as a result of the judgment in this action. Both LIGA and SCGA have filed motions to dismiss on the ground that this Court lacks personal jurisdiction over them.

LEGAL DISCUSSION

The burden of establishing jurisdiction is upon the party seeking to invoke the federal court's jurisdiction. Product Promotions, Inc.

v. Cousteau, 495 F.2d 483 (5th Cir. 1974). In most instances, determining whether the court has in personam jurisdiction requires a two-part analysis. First, the court must determine whether the defendant's actions meet the requirements of the forum state's long-arm statute. If not, the Court has no jurisdiction because service of process cannot be achieved and the inquiry ends. If the defendant's actions do satisfy the statutory requirements, then the court must consider whether the statute goes beyond the permissible limits of state jurisdiction over nonresident defendants set forth in International Shoe Co v. Washington, 326 U.S. 310 (1945), and its progeny. Prejean at 1264.

Alabama courts have abandoned this two-step analysis through their interpretation of the state's long-arm statute. Hales v. First Appalachian Corporation, 494 F.Supp. 330 (N.D.Ala. 1980). The Alabama Supreme Court has

held that service of process and, therefore, personal jurisdiction, is "as broad as the permissible limits of due process. Alabama Weatherproofing Co., Inc. v. Hanby, 431 So.2d 141 (Ala. 1983). Thus, under Alabama law the court must engage only in a single-step analysis to determine whether personal jurisdiction exists; that is, "whether the assertion of jurisdiction meets federal due process standards." MacKinnon v. St. Louis Southwestern Railway, 518 So.2d 89, 91 (Ala. 1987).

In International Shoe, the Supreme Court held that it would be a violation of due process to bring a person into a forum with which he has established no meaningful ties. In that case the Court set forth the guiding principle of analysis in personal jurisdiction cases. The Court held that in order for a court to exercise personal jurisdiction over a defendant, that person must have "minimum contacts" with the forum such that the exercise of jurisdiction

over him "does not offend traditional notions of fair play and substantial justice." Id. at 316.

The plaintiff contends that the contacts the Court should consider in this case are those between the insurer, Midland Insurance, and the forum. According to Olivier, personal jurisdiction over Midland Insurance is equivalent to personal jurisdiction over LIGA and SCGA because guaranty associations "stand in the shoes" of their insolvent insurers. The plaintiff cites several cases to support his contention that this Court has personal jurisdiction over Midland Insurance. Personal jurisdiction over Midland, however, is not in issue. The issue is whether LIGA and SCGA have sufficient minimum contacts with this jurisdiction.

One factor in determining the type of contacts which meet the International Shoe requirements is foreseeability. The defendant's conduct or connection with the forum must be

such that he could "reasonably foresee being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). The Court does not find it reasonably foreseeable that a state-

created agency such as LIGA or SCGA would be subject to suit in a foreign jurisdiction absent specific statutory authority. Plaintiff suggests that it is reasonably foreseeable that a claim against an insolvent insurer may arise in another state. That, however, is not the type of foreseeability dictated by World-Wide Volkswagen. The question is whether the garnishees in this matter could reasonably foresee being haled into court in this jurisdiction.

In light of the purpose and function of state guaranty associations, it would be illogical to assume that the creators of LIGA and SCGA contemplated that those agencies would be subject to jurisdiction in foreign forums.

In Rhulen Agency, Inc. v. Alabama Insurance Guaranty Association, 715 F.Supp. 94 (S.D.N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2nd Cir. 1990) the plaintiff filed suit against twenty-six state insurance guaranty associations such as LIGA and SCGA. The court, holding that it lacked personal jurisdiction over out-of-state insurance guaranty associations, noted:

> The defendants [guaranty associations of various states] for the most part exist under statutory provisions derived from the "Post Assessment Property and Liability Insurance Guaranty Association Model Act," adopted by the National Association of Insurance Commissioners. The various states have established different statutory versions of this Model Act. While the applicable statutes may vary considerably, both in format and the local construction attributed to the specific words, the essential premise upon which all defendants operate is for our purposes identical. They provide statutory benefits to those holders of policies issued within the state by insurers which thereafter failed.

Id. at 96, 97.

Both LIGA and SCGA cover only claims against an insolvent insurer if the insurer is authorized to transact business in the state and the claimant or insured is a resident of the state or the property that is the subject of the claim is permanently located in the state. La. Rev. Stat. Ann. § 22:1379 (West 1978); S.C. Code Ann. § 38-31-10 (Law. Co-op. 1976). Furthermore, these guaranty associations are funded by insurance companies as a condition of their authority to transact business within the state. La.Rev.Stat.Ann § 22:1382 (West 1978); S.C. Code Ann. § 38-31-40 (Law. Co-Op. 1976).

Another minimum contacts requirement is that the defendant must purposefully avail himself of the privilege of conducting activities within in the forum or purposely direct his activities at the forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 474 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

The garnishees in this action cannot be said to have purposefully availed themselves of the privilege of conducting business in this state, nor can they be said to have purposely directed activities at the forum.

This is especially true in light of the fact that LIGA and SCGA are statutorily-created entities. Their duty, if any, to the plaintiff arises only from state law. As the court in Rhulen noted:

> The guaranty associations have no privity of contract with [the plaintiff] or with the named insureds. Their duty is statutory only... Nothing in the Model Act or in any of the local state acts has been brought to our attention which would evidence any intent of these guaranty associations or the respective legislatures which created them to subject their operations to the long-arm jurisdiction of some other state.

Id. at 96, 97.

Based on the plaintiff's failure to establish proof that the garnishees have sufficient minimum contacts with this forum to

satisfy the due process requirements of International Shoe and its progeny, the Court finds that it lacks personal jurisdiction over the movants. Accordingly, it is

ORDERED that the motions to dismiss garnishment filed by the Louisiana Insurance Guaranty Association and by the South Carolina Guaranty Association be and hereby are GRANTED.

DONE this the 19th day of December, 1990.

(signed) Charles R. Butler, Jr.
UNITED STATES DISTRICT JUDGE

(Date stamped: DEC 21 1990)

APPENDIX C

UNITED STATES CONSTITUTION

ARTICLE IV, SECTION. 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

APPENDIX D

UNITED STATES CONSTITUTION

AMENDMENT X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX E

UNITED STATES CONSTITUTION

AMENDMENT XIV, SECTION. 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

ALABAMA RULES OF CIVIL PROCEDURE

RULE 4.2 PROCESS: BASIS FOR AND METHODS OF OUT-OF-STATE SERVICE

(a) Basis for Out-of-State Service.

(1) ***When Proper.*** Appropriate basis exists for service of process outside of this state upon a person in any action in this state when

(A) the person is, at the time of the service of process, either a nonresident of this state or a resident of this state who is absent from the state, and

(B) the person has sufficient contacts with this state, as set forth in subdivision (a)(2) of this rule, so that the prosecution of the action against the person in this state is not inconsistent with the constitution of this state or the Constitution of the United States, or, the person is sued in his capacity as executor, administrator, or other personal representative of an estate for the acts or omissions of his decedent or ward, and the person so sued does not otherwise have sufficient contacts with this state in his capacity as personal representative, but the person's decedent or ward would have been deemed to have sufficient contacts with this state if the action could have been maintained against him.

(2) *Sufficient Contacts.* A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's

(A) transacting any business in this state;

(B) contracting to supply services or goods in this state;

(C) causing tortious injury or damage by an act or omission in this state including but not limited to actions arising out of the ownership, operation or use of a motor vehicle, aircraft, boat or watercraft in this state;

(D) causing tortious injury or damage in this state by an act or omission outside this state if the person regularly does or solicits business, or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in this state;

(E) causing injury or damage in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when the person might reasonably have expected such other person to use, consume, or be affected by the goods in this state, provided that the person also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(F) having an interest in, using, or possessing real property in this state;

(G) contracting to insure any person, property, or risk located within this state at the time of contracting;

(H) living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising from alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state; or

(I) otherwise having some minimum contacts with this state and, under the circumstances, it is fair and reasonable to require the person to come to this state to defend an action. The minimum contacts referred to in this subdivision (I) shall be deemed sufficient, notwithstanding a failure to satisfy the requirement of subdivisions (A)-(H) of this subsection (2), so long as the prosecution of the action against a person in this state is not inconsistent with the constitution of this state or the Constitution of the United States.

(3) *"Person" Defined.* This term "person" as used herein includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association or any other legal or commercial entity.

APPENDIX G

ALABAMA CODE

§ 6-6-390. When process of garnishment obtainable.

The plaintiff in any pending action for the recovery of money or the plaintiff or assignee in any judgment on which execution can issue may obtain process of garnishment as defined in section 6-6-370; provided, that no garnishment shall issue prior to a final judgment, pursuant to this section and sections 6-6-291 through 6-6-294, unless there is a showing that such garnishment is necessary because of extraordinary circumstances. (Code 1852, § 2471; Code 1867, § 2892; Code 1876, §§ 3218, 3219; Code 1886, §§ 2968, 2971; Code 1896, § 2172; Code 1907, § 4301; Code 1923, § 8052; Code 1940, T. 7, § 996; Acts 1951, No. 916, p. 1568.)

APPENDIX H

SOUTH CAROLINA CODE ANNOTATED

§38-31-20. Definitions.

. . .

(3) "Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insured is an insolvent insurer and (a) the claimant or insured is a resident of this State at the time of the insured event, or (b) the property from which the claim arises is permanently located in this State. It does not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, any subrogation recoveries or otherwise.

APPENDIX I

§38-31-30. Application of chapter.

This chapter applies to all kinds of direct insurance except life, title, surety, accident and health, credit, mortgage guaranty, and ocean marine insurance.

APPENDIX J

§38-31-40. Association created; membership as condition of authority to transact insurance; accounts.

There is created a nonprofit unincorporated legal entity to be known as the South Carolina Property and Casualty Insurance Guaranty Association. All insurers defined as member insurers in item (5) of §38-31-20 are members of the Association as a condition of their authority to transact insurance in this State. The Association shall perform its functions under a plan of operation established and approved under §38-31-70 and shall exercise its powers through a board of directors established under §38-31-50. For purposes of administration and assessment, the Association is divided into three separate accounts:

(a) the workers' compensation insurance account;

(b) the automobile insurance account; and

(c) the account for all other insurance to which this chapter applies.

APPENDIX K

§38-31-60. Powers and duties of Association.

The Association:

(a) Is obligated to the extent of claims existing prior to the determination of insolvency and claims arising up to the earliest of the following dates:

(i) thirty days after the determination of insolvency;

(ii) the policy expiration date; or

(iii) the date the insured replaces or cancels the policy.

This obligation includes only the amount each covered claim is in excess of one hundred dollars and is less than three hundred thousand dollars. However the Association shall pay the full amount of any covered workers' compensation claim. In no event is the Association obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises.

APPENDIX L

(b) Is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.

APPENDIX M

(c) Shall allocate claims paid and expenses incurred among the three accounts separately and assess member insurers separately for each account amounts necessary to pay:

(i) the obligation of the Association under item (a) of this section;

(ii) the expenses of handling covered claims;

(iii) the cost of examinations under § 38-31-110; and

(iv) other expenses authorized by this chapter.

The assessments of each member insurer must be in the proportion that the net direct written premiums of the member insurer for the calendar year preceding the insolvency on the kinds of insurance in the account bear to the net direct written premiums of all member insurers for the calendar year preceding the insolvency on the kinds of insurance in the account. Each member insurer must be notified of the assessment not later than thirty days before it is due. No member insurer may be assessed in any year on any account an amount greater than one percent of that member insurer's net direct written premiums for the calendar year preceding the insolvency on the kinds of insurance in the account. If the maximum assessment, together with the other assets of the Association in any account, does not provide in any year an amount sufficient to

make all necessary payments from that account, the funds available must be prorated and the unpaid portion must be paid as soon thereafter as funds become available. The Association may exempt or defer, in whole or in part, the assessment of any member insurer, if the assessment would cause the member insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact insurance. Any member insurer serving in the capacity of a servicing carrier for the South Carolina Reinsurance Facility, the South Carolina Windstorm and Hail Underwriting Association, the Medical Malpractice Joint Underwriting Association, or any other involuntary association may not be assessed for the premiums so written, but the assessment must be made directly against the facility, pool, joint underwriting association, or other association. Each member insurer serving as a servicing facility on behalf of the Association may set off against any assessment authorized payments made on covered claims and expenses incurred in the payment of such claims by the member insurer.

APPENDIX N

§38-31-100. Claimants required to exhaust rights under other policies; claims recoverable from more than one association.

. . .

(2) Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that, if it is a first-party claim for damage to property with a permanent location, he shall seek recovery first from the association of the location of the property, and, if it is a workers' compensation claim, he shall seek recovery first from the association of the residence of the claimant. Any recovery under this chapter must be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served upon counsel for all parties to this proceeding by mailing three copies of the same by United States Mail, first class postage prepaid, on this the 4th day of June, 1992 as follows:

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Supreme Court, U.S.
FILED
JAN 29 1993
OFFICE OF THE CLERK

NO. 91-1984

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Petitioner,

v.

SHERMAN J. OLIVIER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner adopts and incorporates by reference the questions presented for review at pages 1 through 4 of Petitioner's original Petition For Writ of Certiorari filed with the Court on June 4, 1992. The issues for review remained unchanged whether the trial court could exercise jurisdiction consistent with the Tenth and Fourteenth Amendments to the Constitution.

LIST OF THE PARTIES

South Carolina Property and Casualty Insurance Guaranty Association, Petitioner and Garnishee below.

Sherman J. Olivier, Respondent and Plaintiff below.

Louisiana Insurance Guaranty Association, Garnishee below.

Alabama Insurance Guaranty Association, Garnishee below.

There are no parent companies or subsidiaries of the foregoing parties. Alabama Insurance Guaranty Association is not involved in the appeal. All parties to the appeal have previously filed Certificates of Interested Parties and Corporate Disclosure Statements in the Eleventh Circuit which remain correct.

There are two other parties in interest, no longer active in the case, the insolvent

employer Merritt Dredging Company, Inc. and Merritt's insolvent insurer, Midland Insurance Company. Petitioner believes Merritt and Midland have no interest in the outcome of the petition.

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CITATIONS TO OPINIONS BELOW

The initial majority and dissenting opinions prompting the filing of Petitioner's original Petition For Writ of Certiorari, filed with the Court on June 4, 1992, were reported at Olivier v. Merritt Dredging Company, Inc., 954 F.2d 1553 (11th Cir. 1992), and were set out in Appendix A of Petitioner's original Petition For Writ of Certiorari. The initial decision was vacated, and a modified decision was rendered on December 21, 1992. The later decision is reported at Olivier v. Merritt Dredging Company, Inc., 979 F.2d 827 (11th Cir. 1992). The later decision is set out in the Supplemental Appendix filed herewith. The opinion of the district court has not been reported and is set out in Appendix B of Petitioner's original Petition For Writ of Certiorari.

STATEMENT OF THE GROUNDS FOR JURISDICTION

After the initial Eleventh Circuit decision of March 6, 1992, a timely Petition for Writ of Certiorari was filed on June 4, 1992. Petitioner also had pending a Suggestion of Rehearing En Banc, filed March 26, 1992.

It was necessary to proceed with the Petition for Certiorari since the Suggestion for Rehearing did not toll the deadline for filing in this Court. The Suggestion of Rehearing was denied in the modified decision, and Petitioner now seeks review of the modified decision.

At this stage, a Supplemental Brief is being submitted on behalf of Petitioner to clarify the procedural posture of the case and the reason why the original Petition is now ripe for consideration, primarily that the result in the Eleventh Circuit is unchanged.

It is submitted that the analysis of the initial decision from the Eleventh Circuit is

substantially unchanged by the modified decision, and the modified decision should be reviewed since it is contrary to the most recent decisions of the Supreme Court regarding the Fourteenth Amendment. Further, since the result is unchanged in the initial and substituted decisions below, the arguments and authorities cited in the initial Petition for Certiorari should apply now with equal force.

The jurisdiction of this Court is based on 28 U.S.C. § 1254(1) and Supreme Court Rule 10. It is submitted that jurisdiction is proper since the decision of the Eleventh Circuit has decided important questions where the need for uniformity is great and where there is a split of authority.

The Supreme Court should take jurisdiction since the decision from the Eleventh Circuit was inconsistent with the result reached in a previous decision from the Second Circuit,

Rhulen Agency, Inc. v. Alabama Ins. Guar. Assoc., 715 F. Supp. 94 (S.D.N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2d Cir. 1990) (jurisdiction denied), and a previous Florida decision, South Carolina Ins. Guar. Assoc. v. Underwood, 527 So. 2d 931 (Fla. Dist. Ct. App. 1988) (jurisdiction denied). But see Georgia Insurers Insolvency Pool v. Brewer, 583 So. 2d 377 (Fla. Dist. Ct. App. 1991) (jurisdiction upheld), and Bell v. Senn Trucking Co. of Newberry, 418 S.E.2d 310 (S.C. 1992) (jurisdiction upheld). The differences in the determination of similar issues by different courts throughout the country demonstrate the complexity of the issues, the lack of current law providing guidance to address such issues, and the importance of the issues presented for review by this Court.

EXISTENCE OF JURISDICTION BELOW

Jurisdiction for garnishment in the district court was based on Ala. Code § 6-6-390 (1975), following a jury trial of a Jones Act claim. Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 1291. An amicus brief filed in the Eleventh Circuit with respect to Petitioner's Suggestion for Rehearing En Banc has challenged subject matter jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Art. IV, Sec. 1; Amend. X and Amendment XIV, Sec. 1, all as set forth in the Appendix to Petitioner's original Petition For Writ of Certiorari filed with the Court on June 4, 1992.

STATUTORY PROVISIONS INVOLVED

Alabama Long-Arm Statute, Rule 4.2(a), Ala.R.Civ.P.; Alabama garnishment statute, Ala. Code § 6-6-390 (1975); and various statutes creating South Carolina Property and Casualty Insurance Guaranty Association, S.C. Code Ann. §§ 38-31-20(3), 38-31-30, 38-31-40, 38-31-60(a), 38-31-60(b), 38-31-60(c), and 38-31-100(2) (1988), all as set forth in the Appendix to Petitioner's original Petition For Writ of Certiorari filed with the Court on June 4, 1992.

STATEMENT OF THE CASE

Petitioner adopts and incorporates by reference the Statement of the Case in the original Petition For Writ of Certiorari. The Petitioner adds the following to disclose developments occurring subsequent to the filing of Petitioner's original Petition.

On December 21, 1992, the Eleventh Circuit Court of Appeals vacated and withdrew its initial opinion reported at Olivier v. Merritt Dredging Co., Inc., 954 F.2d 1553 (11th Cir. 1992), for which Petitioner originally sought review by this Court. At the request of a member of the Eleventh Circuit Court of Appeals, and subsequent to Petitioner's filing of its Suggestion for Rehearing En Banc, the Court issued a new opinion reported at Olivier v. Merritt Dredging Co., Inc., 979 F.2d 827 (11th Cir. 1992). It is this later decision for which Petitioner now seeks a review by this Court.

The later decision again reversed the District Court in Alabama which had dismissed Plaintiff's Writ of Garnishment on the grounds that the court lacked personal jurisdiction over South Carolina Insurance Guaranty Association. The Eleventh Circuit's vacated opinion of March 6, 1992 had also reversed the decision of the district court.

Both Eleventh Circuit decisions are substantially similar in their putative analysis of the issues. The primary difference is that the later decision no longer contains a dissenting opinion by Senior Judge Frank M. Johnson. In light of the similarities of analysis between the two opinions, Petitioner believes that its legal arguments set forth in its original Petition For Writ of Certiorari with respect to the Eleventh Circuit's vacated

order of March 6, 1992, are equally applicable to the later decision. Both decisions fail to acknowledge that the Petitioner has no contacts with the State of Alabama sufficient to support a garnishment action. Both decisions find personal jurisdiction in violation of the Tenth and Fourteenth Amendments. Additionally, both decisions fail to properly address the split of authority concerning jurisdiction over a Guaranty Association outside the state of creation.

Petitioner therefore adopts the arguments set forth in its original Petition For Writ of Certiorari, and also respectfully requests that this Court closely review the arguments in the initial dissenting opinion by Senior Judge Frank M. Johnson, which Petitioner seeks to adopt in this Supplemental Brief.

ARGUMENT AND CITATION OF AUTHORITIES

SCIGA's Due Process Rights Have Been Violated by a Finding of Jurisdiction by the Eleventh Circuit Court of Appeals.

The insolvency of a property and casualty insurance company raises a host of serious problems for a large number of people involving significant amounts of money. The present Plaintiff's demand for compensation, is one of thousands of claims that are referred to a receiver in the insurers domicile upon a determination of insolvency, and then forwarded to the appropriate state guaranty association for disposition.

Various state legislatures have enacted guaranty acts in order to minimize the loss and dislocation that occurs because of an insurer's insolvency. The South Carolina Insurance Guaranty Association (hereinafter "SCIGA"), is a public entity, created under state law, whose purpose is to alleviate the effects of

insurance company insolvencies on policyholders, claimants and property in, or claimants against policies issued to residents of, its state of creation. S.C. Code Ann. §§ 38-19-20, 38-19-170. SCIGA is a non-profit, unincorporated entity, in which membership is compulsory for "member insurers" that are licensed and write insurance in covered lines of business within the State of South Carolina. In spite of the fact that a state guaranty association is a conduit for public funds, providing a public benefit, where an insurer has been declared insolvent, guaranty associations such as SCIGA are an important step removed from the process by which insurance coverage is written. Among other things, its participation in the claims process is not voluntary nor calculated, but is dictated by its guaranty acts and the random circumstances under which a given claim arises.

It is entirely fortuitous, from the guaranty association's point of view, where its member insurers are domiciled, where the insureds conduct business covered by insurance issued within the state, and where a claimant resides or is injured at the time that an incident occurs. The member insurers that write policies in a given state may be domiciled anywhere in the United States; indeed, subject to certain limitations on international insurers, they may be located anywhere in the world. Their policies are issued to insured individuals and companies that likewise may be doing business anywhere in the United States or abroad, and such policies are contractual obligations made after risks are evaluated and the benefits derived from undertaking such risks are weighed.

Although the Eleventh Circuit opinion suggests minimum contacts do exist between

SCIGA and the State of Alabama, the record with respect to SCIGA clearly reflects that SCIGA does not have any significant connection to states other than South Carolina, and demonstrates that SCIGA has not "purposefully directed" any activities towards the State of Alabama, nor has it availed itself of the privileges of conducting business there. The basic flaw in the Eleventh Circuit analysis was to treat the guaranty associations the same as a private insurance carrier which voluntarily enters contracts with insureds in various states. The Eleventh Circuit thus misapplied the fundamental tests which have been set forth by this Court to determine whether an entity may be subject to the jurisdiction of a state with which it has no significant contacts. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). SCIGA had no relationship

to any claim or any policy with respect to the Plaintiff until the declaration of insolvency by the insurer, Midland Insurance Company, set the receivership and guaranty processes in motion. Only thereafter, and subject to the provisions of its state guaranty acts, did SCIGA become involved.

The Eleventh Circuit opinion apparently concludes that SCIGA and other similarly situated guaranty associations should somehow have been aware that they might be subject to suit in a state within which a member insured has contractual coverage obligations. However, a state guaranty association does not receive or maintain records on specific policies or their provisions, nor does it solicit business out of the state of creation like a private contractual carrier.

As noted in Petitioner's original Petition For Writ of Certiorari, the rationale set forth in this Court's decision of McGee v.

International Life Ins. Co., 355 U.S. 220 (1957), which is so heavily relied upon by the Eleventh Circuit, is inapplicable to guaranty associations such as SCIGA. SCIGA had no presence in Alabama, no property or employees in Alabama, collected no assessments, and had no direct dealings or privity with the insured as did the reinsurer in McGee. Indeed, the Eleventh Circuit has side-stepped a proper analysis of SCIGA's due process rights with respect to personal jurisdiction, by simply holding that if a member insurer is subject to jurisdiction, then a state guaranty association steps into the shoes of such member insurer for all purposes, and is somehow charged with all contacts with which any such member insurer may have developed with a given forum. This dubious analysis is contrary to the Due Process Clause, and, we submit, contrary to the provisions of the creating statutes as well.

SCIGA has no contractual arrangement with its member insurers, and more importantly, no contractual arrangements with the insureds of such member insurers. Additionally, as noted, the legislative act creating SCIGA specifically focuses on protecting property, insureds and claimants of South Carolina. The Act presupposes that, as a result of such focus, requests for the monies at the disposal of the guaranty association would be made in the state of its creation, not through a fortuitous garnishment action instigated in any state in which a particular individual might be injured.

It must be remembered that the issues involved in this case are not concerned with the responsibility for the claim in question (indeed the ocean marine exclusion should avoid coverage altogether), but rather the proper place where such claim should be brought. The

concept of a "guaranty" association must not be confused with the commercial notions of an insurance company or a guarantor, who voluntarily and for a profit entered into specific contractual relations of known scope and location. A guaranty association is a statutory mechanism designed to fund to a limited extent the payment of claims against insolvent insurers. It assumes its duties by operation of law, and functions on a genuinely non-profit basis. Resting personal jurisdiction upon an analogy of voluntary "assumption of obligations" by an insurance company or commercial guaranty is simply inappropriate under the circumstances presented. This is particularly true where the guaranty association does not contain a wholesale adoption of the insurer's policy--but in fact have a number of exclusions and limits on the dollar amount of exposure.

The district court decision, and Judge Johnson's dissent in the Eleventh Circuit's vacated opinion of March 6, 1992, correctly concluded that the exercise of jurisdiction over SCIGA violates the Due Process Clause of the Fourteenth Amendment. Neither SCIGA nor any other guaranty association should be subjected to jurisdiction in another state through the unilateral activities of member insurers, or through the fortuitous circumstances by which a given claim arises. Burger King Corp. v. Rudzewicz, World-Wide Volkswagen Corp. v. Woodson, Id. The exercise of personal jurisdiction over a guaranty association of another state likewise is inconsistent with the requirement of fair play and substantial justice, under the balancing test set forth in Burger King.

CONCLUSION

Subjecting a state guaranty association to suit in multiple foreign jurisdictions is fundamentally inconsistent with the role and purpose of guaranty associations in their state statutory schemes, in the claims process, and in the fiscal assumptions that underlie the guaranty association system. A guaranty association is a carefully designed and closely balanced "safety net" which like any other safety device can be misused or misapplied. The assertion of jurisdiction over a guaranty association outside its state of creation is just such a misuse and misapplication.

If the decision of the Eleventh Circuit stands, the results for the state guaranty association system could be devastating. State guaranty associations would be potentially subjected to conflicting decisions of other state courts called upon to interpret the provisions of another state's guaranty act.

Based on all of the arguments set forth herein and in the initial Petition For Writ of Certiorari, Petitioner respectfully submits that the Court should grant its Petition for review of the Eleventh Circuit Court of Appeals' opinion below.

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Supreme Court, U.S.
FILED
JAN 29 1993
OFFICE OF THE CLERK

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IN THE SUPREME COURT OF THE UNITED STATES

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SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Petitioner,

v.

SHERMAN J. OLIVIER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX OF PETITIONER

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30 pp

SHERMAN J. OLIVIER, Plaintiff-Appellant,

v.

MERRITT DREDGING COMPANY, INC., et al., Defendants,

Louisiana Insurance Guaranty Association; South Carolina Property and Casualty Insurance Guaranty Association, Defendants-Appellees.

United States Court of Appeals, Eleventh Circuit.

December 21, 1992.

Appeal from the United States District Court for the Southern District of Alabama.

ON PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

Before JOHNSTON*, CLARK and PECK**, Senior Circuit Judges.

JOHN W. PECK, Senior Circuit Judge:

Our previous opinion in this case appearing in 954 F.2d 1553 (March 6, 1992), is vacated and withdrawn. The petitions for rehearing and

for rehearing en banc are DENIED. The panel, having been requested by a member of the court in regular active service to reconsider the opinion, has done so and reissues our modified opinion reversing the decision of the district court. No judge on active service has requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5).

Sherman J. Olivier, a resident of Louisiana and a seaman injured aboard a vessel in Alabama, appeals the dismissal of writs of garnishment issued to the Louisiana Insurance Guaranty Association [LIGA] and the South Carolina Property and Casualty Insurance Guaranty Association [SCIGA]. The district court in Alabama dismissed the writs on the ground that the court lacked personal jurisdiction over the garnishees. The court held that LIGA and SCIGA did not have

sufficient minimum contacts with Alabama in order to be subject to personal jurisdiction within the state. We find under the interstate arrangements made by the insurance industry to protect policyholders from losses resulting from the insolvency of an industry member, LIGA and SCIGA consented to be subject to the same personal jurisdiction as one of their insolvent members, and we believe that judicial economy would best be served by keeping this litigation within that forum. Therefore, we reverse the district court's order.

I. FACTS

On August 1, 1983 Sherman J. Olivier sustained personal injuries while employed by the Merritt Dredging Company [Merritt] as a sailor aboard a vessel in Alabama on the Alabama River. At the time of his injuries, Olivier was a resident of Louisiana. Merritt

was a South Carolina corporation with its principal place of business in South Carolina.

On March 30, 1984 Merritt filed for bankruptcy in South Carolina. In order to protect the bankruptcy estate, the bankruptcy court temporarily stayed the personal injury suit Olivier had brought against Merritt in Alabama. The bankruptcy court lifted its stay on September 26, 1985.

To provide insurance for its various operations including its activity in Alabama, Merritt contracted with the Midland Insurance Company [Midland]. Like Merritt, Midland faced financial difficulties. On April 3, 1986 Midland, a New York corporation, was liquidated pursuant to an order of the Supreme Court of New York. The liquidation proceedings once again stayed Olivier's personal injury suit against Merritt.

The second stay was lifted on May 22, 1987. In December 1988 a jury in Mobile,

Alabama awarded Olivier $507,340.00. On February 14, 1989 Olivier received a judgment against Merritt of $522,190.00, interest from the date of the judgment, and costs.

Due to the insolvency of both Merritt and its insurer, Midland, Olivier requested that the district court in Alabama issue writs of garnishment to LIGA, SCIGA, and the Alabama Insurance Guaranty Association [AIGA]. On July 21, 1989 the district court issued the writs.

AIGA, LIGA, and SCIGA are unincorporated associations created by state statutes. *See* Ala. Code §§ 27-42-1 *et seq.* (1975). La. Rev. Stat. Ann. §§ 22:1375 *et seq.* (West Supp. 1991), S. C. Code Ann. §§ 38-31-10 *et seq.* (Law. Co-op. 1976). The AIGA writ is not at issue in this appeal. Insurance guaranty associations were formed by members of the insurance industry to avoid federal legislation that would have created a federal guaranty fund.

In 1966, Senator Thomas Dodd (D. Conn.) focused public attention on the problems created by a growing number of insurance company insolvencies. He released a study on the insolvencies of substandard automobile insurance companies, and introduced Senate Bill 3919 (the 'Dodd Bill') to establish a Federal Motor Vehicle Insurance Guaranty Corporation. The Dodd Bill was designed to protect automobile insurance policyholders and claimants in a manner similar to the protection afforded bank depositors by the Federal Deposit Insurance Corporation. 112 Cong. Rec. 27311 (1966).

* * * * * *

The insurance industry has been historically opposed to the guaranty fund concept. In an effort, however, to avoid federal legislation and the intrusion of the federal government into regulation for solvency, the NAIC swiftly drafted and adopted a model post-insolvency assessment fund bill (the 'Model Act') providing for individual state guaranty funds. The Model Act covered all insurance lines, except life, accident, health, title, credit and mortgage guaranty insurance. While the NAIC and virtually the entire property and casualty industry joined in advocating the passage of this defensive legislation, the American Insurance Association and the State Farm Companies did not initially lend their

> support for a state-by-state enactment of guaranty fund protection. The American Insurance Association, however, later helped draft the NAIC Model Act.
>
> The Magnusson Bill [a substitute for the 'Dodd Bill'] died in the face of the NAIC Model Act, and variations of the Model Act were adopted in all states. Currently, post-insolvency assessment Insurance Guaranty Funds for property and liability insurance exist in Puerto Rico, the Virgin Islands, the District of Columbia, and every state except New York (New York has had a form of pre-insolvency assessment Insurance Guaranty Fund since 1947).[1]

The Insurance Guaranty Fund law does not establish a special private corporation. Rather, an Insurance Guaranty Fund is a public or quasi-public corporation. It is a legislatively declared "mechanism" to aid and benefit losses due to the insolvency of their insurers. It fills a public need without profit to any organizers or stockholders. *O'Malley v. Florida Insurance Guaranty Association, et al.*, 257 So. 2d 9, 11 (Fla.

1971). The statutory purpose of the Insurance Guaranty Fund law is to place claimants in the same position they would have been in if the insurer had not become insolvent. *Lucas v. Illinois Insurance Guaranty Fund*, 52 Ill.App.3d 237, 10 Ill. Dec. 81, 83, 367 N.E.2d 469, 471 (1978).

II. DISCUSSION

A. *Alabama Long-Arm Jurisdiction*

[1, 2] This circuit conducts *de novo* review of a district court's dismissal of an action for lack of personal jurisdiction. *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990). We begin our inquiry into whether the district court properly refused to assert personal jurisdiction with a two-part analysis. First, we consider whether the district court could obtain personal jurisdiction over the defendants pursuant to

the applicable state long-arm statute. Second, we consider whether the exercise of personal jurisdiction would violate the due process clause of the Fourteenth Amendment to the United States Constitution.

In interpreting the reach of the state's long-arm statute, the Supreme Court of Alabama has extended the jurisdiction of Alabama courts to the extent permissible under the due process clause of the Fourteenth Amendment. *See Alabama Waterproofing Co., Inc. v. Hanby*, 431 So. 2d 141, 145 (Ala. 1983); *Sells v. International Harvester Co., Inc.*, 513 F.2d 762 (5th Cir. 1975). Thus, in order to determine whether the district court in Alabama properly refused to exercise personal jurisdiction, we need only consider whether the exercise of jurisdiction would have satisfied the requirements of due process.

B. *Due Process*

[3] The determination of whether a district court can exercise personal jurisdiction over a non-resident defendant is itself a two-part inquiry. In the first prong of our due process inquiry, we consider whether the defendants, LIGA and SCIGA, standing in the shoes of the insolvent insurer, engaged in minimum contacts with the State of Alabama. In the second prong of our inquiry, we consider whether the exercise of personal jurisdiction over the defendants would offend "traditional notions of fair play and substantial justice." *Madara*, 916 F.2d at 1516 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L.Ed. 95 (1945)).

1. Minimum Contacts

In analyzing the parties' arguments we are guided by the language of several Supreme Court

opinions. As the Supreme Court has stated:

> [M]inimum-contacts analysis presupposes that two or more States may be interested in the outcome of a dispute, and the process of resolving potentially conflicting "fundamental substantive social policies" can usually be accommodated through choice-of-law rules rather than through outright preclusion of jurisdiction in one forum. (citations omitted)

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 483 n.26, 105 S. Ct. 2174, 2188 n.26, 85 L.Ed.2d 528 (1985) (citations omitted).

In 1989 Olivier, a resident of Louisiana, received a judgment in Alabama (the place where he sustained his injuries) against Merritt, a South Carolina corporation. Olivier contends that the judgment entitled him to proceed in Alabama against Merritt's bankrupt insurer, Midland. This would be undoubtedly correct but for the bankruptcy of Midland. Alabama law respecting its long-arm statute states:

(a) Basis for Out of State Service.

> (2) SUFFICIENT CONTACTS. A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's:
>
> > (G) Contracting to insure any person, property, or risk located within this state at the time of contracting.[2]

Olivier maintains that his claim is a "covered claim" within the meaning of the Louisiana and South Carolina statutes governing the respective state insurance guaranty associations. Midland insured Merritt, a resident of South Carolina and a beneficiary of the SCIGA; Olivier was a resident of Louisiana and a beneficiary of the LIGA at the time of the insured event. *See* La. Rev. Stat. Ann. § 22:1379(3)(a),[3] S. C. Code Ann. § 38-31-20(6).[4]

Furthermore, Olivier argues that since his claim is a "covered claim," according to the respective statutes, LIGA and SCIGA are deemed

insurers to the extent of Midland's obligations. *See* La. Rev. Stat. Ann. §§ 22:1382 A(1) and (2),[5] S. C. Code Ann. §§ 38-31-60(a) and (b).[6] We agree with Olivier's position.

Olivier contends that Midland is subject to personal jurisdiction in Alabama because it provided insurance coverage for Merritt for accidents that occurred while operating its vessels in Alabama waters. By guaranteeing payment of Midland's policies that provided insurance for claimants who are state residents or insureds who are state residents, Olivier contends LIGA and SCIGA should reasonably have foreseen that they would be subject to suit in other jurisdictions. Olivier claims that the statutes, which place LIGA and SCIGA in the position of an insolvent insurer, impose affirmative, extraterritorial obligations upon them. Because Midland is subject to personal

jurisdiction in Alabama, both LIGA and SCIGA are subject to personal jurisdiction in Alabama. Olivier argues that LIGA's and SCIGA's statutory obligations establish minimum contacts with Alabama sufficient to justify the district court's exercise of personal jurisdiction over them.

As mere creations of their respective state statutes, LIGA and SCIGA claim they have not purposefully directed any activity toward the State of Alabama. Neither LIGA nor SCIGA maintains any offices or agents in Alabama. The associations contend that Midland's contacts with Alabama are not at issue since personal jurisdiction is not being sought after Midland, but after LIGA and SCIGA. LIGA and SCIGA claim that they will be denied due process if they are subject to legal liability in Alabama on account of the unilateral activity of a third party -- Midland. We

interpose that it is our view that Midland's activity was not unilateral. Midland was a member of SCIGA. The record is silent as to whether Midland was a member of LIGA, but we assume it was since LIGA did not raise this as a defense. A member of the association, acting within the framework of the Interstate compact who becomes insolvent, automatically makes the association the alter ego of that failed member.

In addition, LIGA and SCIGA argue that although it might have been foreseeable that the associations could become involved in litigation in Alabama, such foreseeability alone is insufficient to confer personal jurisdiction. LIGA and SCIGA maintain that foreseeability is only one factor to be considered in an analysis of a defendant's minimum contacts with a forum.

LIGA and SCIGA note that neither of the state insurance guaranty acts specifically

authorize suit against an insurance guaranty association outside the state which created the association. The associations argue that this conspicuous absence indicates that it was not the intent of the state legislatures to permit LIGA and SCIGA to be subject to suit in other jurisdictions.[7]

In support of their arguments, LIGA and SCIGA rely upon the reasoning of the district court in *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n.*, 715 F.Supp. 94, 97 (S.D. N.Y. 1989), *aff'd on other grounds*, 896 F.2d 674 (2nd Cir. 1990). We are not persuaded by the court's reasoning in *Rhulen*. Indeed, we believe the district court decision concerning personal jurisdiction over AIGA and other state insurance guaranty associations is entitled to no weight since the Second Circuit held that the district court lacked subject matter jurisdiction; this holding precluded any

consideration of the existence of personal jurisdiction over the defendants. *Rhulen*, 896 F.2d at 675-676.

For the reasons outlined below, we believe Olivier has the superior argument. In the seminal case, *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, the Supreme Court of the United States held that the due process clause of the Fourteenth Amendment requires that a defendant be subject to the personal jurisdiction of the court. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S. Ct. 559, 564, 62 L.Ed.2d 490 (1980). Thus, we recognize that even if the forum state is the most convenient location for litigation, the due process clause may act to divest a state's courts of the power to render a valid judgment if a defendant does not have the requisite minimum contacts with the forum. *World-Wide Volkswagen*, 444 U.S.

at 294, 100 S. Ct. at 566; *Hanson v. Denckla*, 357 U.S. 235, 251, 254, 78 S. Ct. 1228, 1238, 1240, 2 L.Ed.2d 1283 (1958).

[4] The Supreme Court has opined that the due process clause of the Fourteenth Amendment requires that defendants have "fair warning" that particular activities may subject them to the jurisdiction of foreign sovereigns. *Burger King*, 471 U.S. at 472, 105 S. Ct. at 2182. One of the considerations important in assessing whether or not a defendant has fair warning is the foreseeability of suit within the jurisdiction. The foreseeability that is critical in an analysis of minimum contacts is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. at 567. In attempting to define when a defendant should reasonably

anticipate being haled into court, the Supreme Court has stated: ". . . there must be some act by which the defendant purposefully availed itself of conducting activities within the forum state." *Hanson*, 357 U.S. at 253, 78 S. Ct. at 1239-1240. This requirement exists to ensure that a defendant will not be subject to legal liability in a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183.

[5] In the instant case, LIGA and SCIGA are subject to legal liability in Alabama neither on account of random contacts nor on account of the unilateral activity of Midland Insurance. In forming the state insurance guaranty associations to avoid federal legislation creating a national guaranty fund, the insurance industry had to anticipate that the guaranty associations would be haled into

the same courts where their insolvent members would have been subject to the reach of due process. Thus, SCIGA and LIGA consented to service of process in Alabama in this case.

LIGA and SCIGA guaranteed payment of "covered claims." *See* La. Rev. Stat. Ann. § 22:1379(3)(a), S. C. Code Ann. § 38-31-20(6). The "claimant," Olivier, was a Louisiana resident and he has a colorable claim. The "insured," Merritt, was a South Carolina corporation and it has a colorable claim. Not only did LIGA and SCIGA guarantee payment of "covered claims," but they also assumed all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. *See* La. Rev. Stat. Ann. § 22:1382 A(2), S. C. Code Ann. § 38-31-60(b). By the language of the statutes that govern LIGA and SCIGA, we conclude that these associations had fair warning that they could

be subject to suit for "covered claims" in jurisdictions outside of their respective states.

[6] Midland insured Merritt's operations in Alabama. Since the Supreme Court's decision in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L.Ed.2d 223 (1957), it has been the law that a company with insurance obligations in a state in which it has no other business has submitted to the jurisdiction of the state's courts. LIGA and SCIGA, by standing in Midland's shoes, also have consented to jurisdiction in the state's courts.

Our decision in this case is bolstered by a South Carolina Supreme Court opinion which was issued after our initial opinion was filed. In *Bell v. Senn Trucking Co. of Newberry*, 418 S.E.2d 310 (S.C. 1992), the court stated the following:

The Georgia Pool first asserts that it is not amenable to suit in South Carolina under the South Carolina long-arm statute, S. C. Code Ann. § 36-2-803 (1976). We disagree. South Carolina's long-arm statute provides that a court may exercise personal jurisdiction over a person who contracts to insure any person, property or risk located in South Carolina at the time of contracting. S. C. Code Ann. § 36-2-803(1)(f)(1976). Anglo-American is subject to in personam jurisdiction in South Carolina because it contracted with Senn of Georgia to insure a risk in South Carolina. The Georgia legislature requires the Georgia Pool to assume the obligations of an insolvent insurer in regard to covered claims for a specified period following the date an insurer is determined to be insolvent. Ga. Code Ann. § 33-36-9 (1990). The Georgia Pool is "deemed to be the insurer for such period with respect [to] and to the extent of the claims with all the rights, duties, and obligations of the insolvent insurer . . . ." Id. Moreover, as a condition of doing business in Georgia, an insurer is deemed to have appointed the Georgia Pool as its agent with respect to the investigation, adjustment, compromise, and settlement of covered claims in the event the insurer becomes insolvent. Id. § 33-36-13.

Based on the plain language of the Georgia Code, once Anglo-American

> became insolvent, the Georgia Pool became subject to the jurisdiction of the courts of this State as Anglo-American's alter-ego and agent. We find that the trial judge did not err in holding that the Georgia Pool is subject to in personam jurisdiction in South Carolina.

418 S.E.2d at 311-12.

We conclude that the associations' obligations to defend suits in other jurisdictions would not be unduly burdensome. Indeed, both LIGA and SCIGA may alleviate the cost of litigation in other jurisdictions by adjusting their insurance assessments. Or if the expenses are too great, they have the option of altering their obligations and coverage for claims. *Cf. World-Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. at 567.

2. Fair Play and Substantial Justice

[7] Once a court has decided that a defendant has established minimum contacts within a forum state, these contacts may be

considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *Burger King*, 471 U.S. at 476, 105 S. Ct. at 2184. As the Supreme Court has stated, other factors may serve to establish the reasonableness of personal jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *Burger King*, 471 U.S. at 477, 105 S. Ct. at 2184. Some of these factors include: the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *Id.*

In addition, as the Supreme Court of the United States has noted ". . . modern

transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee*, 355 U.S. at 222-223, 78 S. Ct. at 201. The Supreme Court subsequently stated that the historical developments noted in *McGee* have only accelerated in the generation since that case was decided. *World-Wide Volkswagen*, 444 U.S. at 293, 100 S. Ct. at 565. Requiring adjudication in Alabama will not impose a substantial burden on LIGA and SCIGA.

It would be unduly burdensome, however, to require Olivier to seek coverage for his claim from LIGA in Louisiana courts and from SCIGA in South Carolina courts. Such a requirement would spread thin his resources and would hamper Olivier's ability to obtain quick, convenient, and effective relief. *See McGee*, 355 U.S. at 228, 78 S. Ct. at 201. Indeed, it

would frustrate the very purposes of the state insurance guaranty associations. *See e.g.*, La. Rev. Stat. Ann. § 22:1376. Furthermore, a requirement that Olivier sue in both Louisiana and South Carolina would pose an unnecessary waste of precious judicial resources. Separate litigations do not necessarily insure fairness; in this case they would inhibit it.

III. CONCLUSION

For the reasons stated above, we REVERSE the order of the district court and REMAND the case for further proceedings consistent with this opinion.

FOOTNOTES

* *See* Rule 34-2(b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

** Honorable John W. Peck, Senior U. S. Circuit Judge for the Sixth Circuit, sitting by designation.

1 Linda M. Lasley, Patricia Winters, and Debra R. Puebla, *Insurance Guaranty Funds: The New 'Money Pit'?*, 416 Practicing Law Institute, Comm. 113 (March 1, 1987).

2 Alabama Rules of Civil Procedure 4.2(a)(2)(G).

3 The text of this section after amendments in 1987 does not differ materially from the text as it existed at the time of Olivier's accident and the date of insolvency of Midland Insurance. The current text reads as follows:

> "Covered claim" means an unpaid claim, including one for unearned premiums by or against the insured or agent, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Part applies issued by an insurer, if such insurer becomes an insolvent insurer after September 1, 1970, and (i) The claimant or insured is a resident of this state at the time of the insured event; or (ii) The property from which the claim arises is permanently located in this state.

[4] For the sake of brevity, where the South Carolina statutes governing SCIGA do not contain any important differences from the Louisiana statutes governing LIGA, we have omitted from this opinion the texts of the South Carolina statutes.

[5] The relevant portions of these sections read as follows:

> A. The association shall:
> (1)(a) Be obliged to the extent of the covered claims . . . .
>
> (2) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties and *obligations of the insolvent insurer as if the insurer had not become insolvent*. (Emphasis added)

[6] S. C. Code Ann. § 38-31-60(b) corresponds to La. Rev. Stat. Ann. § 22-1382 A(2). The first sentence of the paragraph in the South Carolina Code is virtually identical to its Louisiana counterpart. The South Carolina Legislature, however, added the following to paragraph (b) of § 38-31-60:

> However, the Association has the right but not the obligation to defend an insured who is not a resident of this State at the time of the insured event unless the property from which the claim arises is permanently located in this State in which instance the Association does have the obligation to defend the insured.

7 We think this argument borders on the specious. The intent of the legislature had to be to protect their citizens as either policyholders or victims of the insolvency of an insurance company. It must be remembered that this issue has arisen not because Merritt became insolvent but because Midland Insurance Company became insolvent. If Merritt had remained solvent, it would have had to pay the judgment but for the existence of the guaranty associations. The South Carolina Legislature intended to protect its citizens (such as Merritt) who were policyholders from such losses. In reaching our conclusion in this case, we disregard the bankruptcy of Merritt.

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SUPREME COURT, U.S.
FILED
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NO. 91-1984

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Petitioner,

v.

SHERMAN J. OLIVIER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CONTROVERSION OF QUESTIONS PRESENTED FOR REVIEW

Petitioner has set forth seven questions that it contends are presented for review by its petition for writ of certiorari. These seven questions are duplicitous. There really is only a single question presented for review:

> Whether the Eleventh Circuit's holding that the South Carolina Property and Casualty Insurance Guaranty Association ("SCIGA") is subject to personal jurisdiction in the State of Alabama for the claim submitted by Sherman Olivier that it is statutorily obligated to cover is consistent with the Due Process Clause of the Fourteenth Amendment?

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CITATIONS TO OPINIONS BELOW

Respondent adopts the citations to opinions below set forth in petitioner's supplemental petition for writ of certiorari filed herein.

CONTROVERSION OF STATEMENT OF THE GROUNDS FOR JURISDICTION

Contrary to petitioner's assertion that jurisdiction of this court is based upon 28 U.S.C. §1254(1) and Supreme Court Rule 10, jurisdiction is based upon 28 U.S.C. §1254(1) only. Respondent's substantial disagreements with petitioner's arguments in favor of granting the writ are set forth hereinbelow in the argument portion of this brief.

CONTROVERSION OF CONSTITUTIONAL PROVISIONS INVOLVED

The only constitutional provision involved in this appeal is Amendment XIV, Sec. 1, to the United States Constitution. Contrary to petitioner's assertion, Article IV, Sec. 1 and Amendment X to the United States Constitution are not involved.

STATEMENT OF THE CASE

Petitioner's statement of the case is more of an argument than a fair statement of the case. Petitioner's statement of the case sets out facts in a very cursory and disjointed fashion, and blatantly omits certain background facts and statutory provisions which were critical to the Eleventh Circuit's decision. These pertinent facts and statutory provisions are set forth below:

A. Background facts.

On August 1, 1983, Sherman J. Olivier ("Olivier") sustained personal injuries while employed by Merritt Dredging Company, Inc. ("Merritt") as a seaman and a member of the crew of a vessel which was engaged

in dredging operations in the State of Alabama on the Alabama River. At the time of the incident, Olivier was a resident of the State of Louisiana, and Merritt was a South Carolina corporation having its principal place of business in South Carolina.

On July 31, 1984, Olivier filed an action against Merritt under the Jones Act and general maritime law in the United States District Court for the Southern District of Alabama, Southern Division. Olivier sought to recover for personal injuries he sustained as a result of his August 1, 1983 accident.

Subsequently, Merritt filed a bankruptcy petition pursuant to Chapter 11 in the United States Bankruptcy Court for the

District of South Carolina, and Olivier's action against Merritt was stayed. That stay was lifted on September 26, 1985 to allow this case to proceed to determine the liability of Merritt and to recover insurance proceeds in the event that judgment was entered against Merritt, as long as the bankruptcy estate was not unduly encumbered by defending the action. The order lifting the stay further provided that no execution of any judgment could be made against Merritt without further order of the bankruptcy court and that the order was not to be construed as allowing Olivier to better his position with regard to the bankruptcy estate.

At the time of the incident, Merritt had a workmen's compensation and employer's liability insurance policy with a marine

endorsement, which provided coverage for liability to members of the crew of a vessel. That policy was issued by Midland Insurance Company ("Midland") and was in full force and effect at the time of the incident. The policy limits of that policy were $500,000.00, and the total estimated annual premium was $86,541.00. The Midland policy insured risks and operations in the State of Alabama, and included within the annual premium was an estimated annual premium for Merritt's Alabama operations of $17,970.00.

On April 3, 1986, Midland was placed in liquidation pursuant to an order of liquidation entered by the Supreme Court of New York. Olivier's action was stayed because of the liquidation proceeding, but that stay was lifted subsequently on May

22, 1987. It is undisputed that the Midland policy would have afforded coverage for the claim asserted by Olivier had Midland not been liquidated.

On or about December 5, 1988, Olivier's personal injury claim against Merritt was tried before the United States District Court for the Southern District of Alabama, Southern Division. Merritt was represented at the trial by counsel which had been retained by the excess underwriters. At the conclusion of the trial, the jury awarded a verdict in favor of Olivier and against Merritt, and on February 14, 1989, a judgment in the amount of $522,190.00, plus interest, was entered in favor of Olivier and against Merritt. That judgment has been satisfied by the excess underwriters as to all amounts in excess of

$469,645.98, leaving the unpaid, underlying $469,645.98 portion of the judgment fully effective.

On July 21, 1989, the district court at the request of Olivier issued writs of garnishment to SCIGA, the Louisiana Insurance Guaranty Association ("LIGA"), and the Alabama Insurance Guaranty Association ("AIGA"), asserting that those guaranty associations are justly indebted to Olivier in the amount of $469,645.98, plus interest and costs.

LIGA and SCIGA moved the court to dismiss the garnishment action on several grounds, including that the court lacked personal jurisdiction over them. On December 21, 1990, the court issued an order dismissing the garnishment action as to

LIGA and SCIGA for lack of personal jurisdiction. On January 18, 1991, Olivier filed a timely appeal of the court's December 21, 1990 order.

On March 6, 1992, the United States Court of Appeals for the Eleventh Circuit reversed the district court's order, finding that the district court had personal jurisdiction over LIGA and SCIGA, and remanded the case to the district court for further proceedings. Olivier v. Merritt Dredging Co., Inc., 954 F.2d 1553 (11th Cir. 1992). Senior Circuit Judge Frank M. Johnson filed a dissenting opinion. On March 26, 1992, LIGA and SCIGA filed a suggestion of rehearing *en banc*. On December 21, 1992, the Eleventh Circuit Court of Appeals issued a new decision, Olivier v. Merritt Dredging Co., Inc., 979 F.2d 827

(11th Cir. 1992), in which it vacated and withdrew its March 6, 1992 decision, denied the suggestions for rehearing *en banc*, and issued a modified opinion. The Eleventh Circuit's December 21, 1992 modified opinion also held that the district court has personal jurisdiction over LIGA and SCIGA and reversed the district court's order and remanded the case for further proceedings. The modified opinion contained no dissent. Indeed, all judges on the panel concurred with the decision, and no judge on active service requested that the court be polled on rehearing *en banc*.

Petitioner seeks review by this Court of the Eleventh Circuit's December 21, 1992 decision.

B. Statutory rules and regulations.

SCIGA is a statutorily created association established, in part, to provide a mechanism for the payment of covered claims under certain types of insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer. S.C. Code Ann. §38-31-10, et seq. (Law. Co-op. 1976). SCIGA is funded by insurance companies, such as Midland, as a condition of their authority to transact business within the state. S.C. Code Ann. §38-31-40 (Law. Co-op. 1976). Prior to its liquidation in 1986, Midland was subject to assessment by SCIGA based upon premiums which would have included the premium paid on Merritt's policy and other similar

policies. S.C. Code Ann. §38-31-60 (Law. Co-op. 1976).

The South Carolina Property and Casualty Insurance Guaranty Association Act sets forth the rules and regulations governing the operation of SCIGA. Section 38-31-60 of that act sets forth the powers and duties of the SCIGA, and provides in pertinent part:

> The Association:
>
> (a) Is obligated to the extent of claims existing prior to the determination of insolvency and claims arising up to the earliest of the following dates:
>
> (i) thirty days after the determination of insolvency;
>
> (ii) the policy expiration date; or

(iii) the date the insured replaces or cancels the policy.

This obligation includes only the amount each covered claim is in excess of one hundred dollars and is less than three hundred thousand dollars. . . .

(b) Is considered the insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. [Emphasis added].

S.C. Code Ann. §38-31-60 (Law. Co-op. 1976).

A covered claim is defined in §38-31-20 of that act as follows:

"Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this chapter applies issued by an

> insurer, if the insurer is an insolvent insurer and (a) the claimant or insured is a resident of this state at the time of the insured event; or (b) the property from which the claim arises is permanently located in this state. . . . [Emphasis added].

S.C. Code Ann. §38-31-20 (Law. Co-op. 1976).

In the event a claimant has a claim against more than one state guaranty association arising out of the same incident, the statutory rules for SCIGA contain a "choice of guaranty association" provision:

> Any person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that, if it is a first-party claim for damage to property with a permanent location, he shall seek recovery first from the association of the

> location of the property, and, if it is a workers' compensation claim, he shall seek recovery first from the association of the residence of the claimant. Any recovery under this chapter must be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

S.C. Code Ann. §38-31-100(2) (Law. Co-op. 1976).

In light of the above provisions and similar provisions contained within LIGA's and AIGA's statutes, Olivier filed garnishment actions against SCIGA, LIGA and AIGA seeking to recover his outstanding judgment on the grounds that each is liable to him as a "claimant" to insurance proceeds owed by Midland on behalf of Merritt. Olivier asserts that the order of priority for payment of his judgment is SCIGA, LIGA and

AIGA. This petition does not involve the garnishments against LIGA and AIGA.

SUMMARY OF ARGUMENT

None of the issues identified in Supreme Court Rule 10 governing the grant or denial of writs of certiorari are at issue here. The case of Rhulen Agency, Inc. v. Alabama Insurance Guaranty Association, 715 F. Supp. 94 (S.D.N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2nd Cir. 1990), cited by petitioner as creating a conflict between the Courts of Appeal does not conflict with the decision below as the Second Circuit held that the district court should have dismissed the case for lack of subject matter jurisdiction, not for lack of personal jurisdiction, which is the issue in this case. Therefore, SCIGA's petition for writ of certiorari should be denied.

The Eleventh Circuit's decision in Olivier v. Merritt Dredging Co., Inc., 979 F.2d 827 (11th Cir. 1992), does not violate the Fourteenth Amendment due process rights of SCIGA. In holding that SCIGA was subject to personal jurisdiction in Alabama for Olivier's claim, the Eleventh Circuit properly applied the standards set forth by International Shoe Co. v. Washington, 326 U.S. 310 (1945), and its progeny, and the standards required by the Due Process Clause of the Fourteenth Amendment. Accordingly, SCIGA's petition for writ of certiorari should be denied.

ARGUMENT AND CITATION OF AUTHORITIES

I. THE ELEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES FEDERAL COURT.

Petitioner asserts that the Supreme Court should review the court of appeals decision in this case because there is a conflict or split between the federal circuits pertaining to the jurisdictional issue presented by petitioner's petition for writ of certiorari. That assertion is incorrect. There is no split or conflict between the federal circuits pertaining to the issue presented by petitioner's petition for writ of certiorari. The only federal circuit that has addressed the issue currently before this Court is the Eleventh Circuit in Olivier v. Merritt Dredging Company, Inc., 979 F.2d 827 (11th

Cir. 1992). The Olivier decision is well-reasoned and thoroughly supported. Each member of the panel that considered the case concurred in the decision, and no judge requested that the court be polled on petition for rehearing *en banc*.

Petitioner stated in its original and supplemental petitions for writ of certiorari that the Eleventh Circuit's decision in Olivier is inconsistent with the Second Circuit's decision in Rhulen Agency, Inc. v. Alabama Insurance Guaranty Association, 715 F. Supp. 94 (S.D.N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2nd Cir. 1990). That is incorrect. In Rhulen, the Second Circuit did not hold that the district court did not have personal jurisdiction over the various guaranty associations involved in that case, nor did it even

reach the personal jurisdiction issue. Rather, the Second Circuit affirmed the district court's dismissal of that action, holding that the district court lacked subject matter jurisdiction over the action. In Rhulen, an insurance agency with numerous customers residing throughout the country sued numerous state guaranty associations in New York. The agency had advanced payment of claims to its customers insured by Transit Insurance Company, and obtained assignments from the customer-insureds of their rights against Transit and the appropriate guaranty association. After the guaranty associations refused to reimburse the agency for the payment of claims, the agency filed suit in New York against the various guaranty associations. The district court dismissed the action for lack of personal jurisdiction. On appeal,

the Second Circuit affirmed the district court's dismissal of the action, but on the grounds that the court lacked subject matter (diversity) jurisdiction over the action. The Second Circuit did not reach the personal jurisdiction issue. Inasmuch as the district court lacked subject matter jurisdiction, its opinion as to personal jurisdiction is null and void.

Because the Eleventh Circuit's decision is not in conflict with the decisions of another United States Court of Appeals, and because petitioner has not set forth any other basis for jurisdiction under Supreme Court Rule 10, the petition for writ of certiorari should be denied.

II. THE ELEVENTH CIRCUIT'S HOLDING THAT SCIGA IS SUBJECT TO PERSONAL JURISDICTION IN ALABAMA FOR OLIVIER'S CLAIM IS CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

SCIGA's primary argument is that the Eleventh Circuit failed to apply the applicable standards set forth by this Court and required by the Fourteenth Amendment in holding that SCIGA was subject to personal jurisdiction in Alabama as to Olivier's claim. However, a careful reading of the Olivier decision demonstrates that the Eleventh Circuit carefully applied standards set forth by the Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945), World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), and Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). Indeed, the Eleventh Circuit first made a minimum contacts analysis

applying the standards set forth in those cases, and then properly considered whether the assertion of personal jurisdiction over SCIGA would comport with fair play and substantial justice. The Eleventh Circuit's due process analysis was entirely consistent with the standards set forth by the Supreme Court and therefore SCIGA's petition for writ of certiorari should be denied.

A. Minimum contacts.

The Eleventh Circuit closely analyzed the history behind the creation of the guaranty associations, the language of the guaranty association statutes, and the facts surrounding Olivier's claim and correctly concluded that SCIGA purposefully availed itself of conducting activities in

Alabama so as to be subject to personal jurisdiction there.

In analyzing whether SCIGA had minimum contacts with the State of Alabama for purposes of Olivier's claim, the Eleventh Circuit found significant that state insurance guaranty associations, including SCIGA, were purposefully formed by members of the insurance industry to avoid federal legislation that would have created a federal guaranty fund. The Eleventh Circuit stated:

> ... Insurance guaranty associations were formed by members of the insurance industry to avoid federal legislation that would have created a federal guaranty fund.
>
> In 1966, Senator Thomas Dodd (D. Conn.) focused public attention on the problems created by a growing

number of insurance company insolvencies. He released a study on the insolvencies of substandard automobile insurance companies, and introduced Senate Bill 3919 (the 'Dodd Bill') to establish a Federal Motor Vehicle Insurance Guaranty Corporation. The Dodd Bill was designed to protect automobile insurance policyholders and claimants in a manner similar to the protection afforded bank depositors by the Federal Deposit Insurance Corporation. 112 Cong. Rec. 27311 (1966).

* * * * * *

The insurance industry had been historically opposed to the guaranty fund concept. In an effort, however, to avoid federal legislation and the intrusion of the federal government into regulation for solvency, the NAIC swiftly drafted and adopted a model post-insolvency assessment

fund bill (the 'Model Act') providing for individual state guaranty funds. The Model Act covered all insurance lines, except life, accident, health, title, credit and mortgage guaranty insurance. While the NAIC and virtually the entire property and casualty industry joined in advocating the passage of this defensive legislation, the American Insurance Association and the State Farm Companies did not initially lend their support for a state-by-state enactment of guaranty fund protection. The American Insurance Association, however, later helped draft the NAIC Model Act.

The Magnusson Bill [a substitution for the 'Dodd Bill'] died in the face of the NAIC Model Act, and variations of the Model Act were adopted in all states. Currently, post-insolvency assessment insurance guaranty funds

> for property and liability insurance exist in Puerto Rico, the Virgin Islands, the District of Columbia, and every state except New York (New York has had a form of preinsolvency assessment Insurance Guaranty Fund since 1947).

Olivier v. Merritt Dredging Company, Inc., 979 F.2d 827, 829-30 (11th Cir. 1992).

Also significant to the court's minimum contacts analysis was the purpose for which guaranty associations were created:

> The insurance guaranty fund law does not establish a special private corporation. Rather, an insurance guaranty fund is a public or quasi-public corporation. It is a legislatively declared "mechanism" to aid and benefit numerous citizens who have suffered losses due to the insolvency of their insurers. It fills a public need without profit to any organizers or stock-

> holders. The statutory purpose of the insurance guaranty fund law is to place claimants in the same position they would have been in if the insurer had not become insolvent.

Id. at 830.

In light of the history of, and purpose for, the state guaranty associations, the Eleventh Circuit properly concluded that the insurance industry had to have anticipated that the guaranty associations would be hailed into the same courts where their insolvent members would have been subject to the reach of due process, and rightly found that the guaranty associations consented to service of process in those foreign jurisdictions. Indeed, the Eleventh Circuit stated:

> In the instant case, LIGA and SCIGA are subject to legal liability in Alabama neither on account of random contacts nor on account of the unilateral activity of Midland Insurance. In forming the state insurance guaranty associations to avoid federal legislation creating a national guaranty fund, the insurance industry had to anticipate that the guaranty associations would be hailed into the same courts where their insolvent members would have been subject to the reach of due process. Thus, SCIGA and LIGA consented to service of process in Alabama in this case.

Id. at 833. Clearly, the court found the act of forming the state insurance guaranty associations to avoid federal legislation creating a national guaranty fund constituted a "purposeful availment" of its activities in foreign jurisdictions. The Eleventh Circuit also properly found that SCIGA consented to service of process in

Alabama, given the history of its creation.

In conducting its minimum contacts analysis, the Eleventh Circuit also properly found that the express language of the statute creating SCIGA demonstrates that SCIGA had fair warning that it could be subject to suit for "covered claims" in jurisdictions outside of their respective states.

> LIGA and SCIGA guaranteed payment of "covered claims." The "claimant," Olivier, was a Louisiana resident and he has a colorable claim. The "insured," Merritt, was a South Carolina corporation and it has a colorable claim. Not only did LIGA and SCIGA guarantee payment of "covered claims," but they also assumed all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent. By the language of the statutes that govern LIGA and SCIGA, we conclude that these associations had fair warning that they could be subject to

> suit for covered claims in jurisdictions outside of their respective states.

Id.

The court also found significant that Midland was subject to personal jurisdiction in Alabama because it insured Merritt's operations there. Because SCIGA stands in the shoes of Midland by virtue of the express language of its statute, the Eleventh Circuit properly concluded that SCIGA consented to jurisdiction in the courts of Alabama. Id.

Significantly, the Eleventh Circuit's decision is bolstered by a decision rendered by the Supreme Court of South Carolina, the home state of SCIGA. In Bell v. Senn Trucking Co. of Newberry, 418 S.E.2d

310 (S.C. 1992), the Supreme Court of South Carolina addressed the identical issue and held that the Georgia Guaranty Association was subject to personal jurisdiction in the state of South Carolina. The following language is significant:

> The Georgia Pool first asserts that it is not amenable to suit in South Carolina under the South Carolina long-arm statute, S.C. Code Ann. §36-2-803 (1976). We disagree. South Carolina's long-arm statute provides that a court may exercise personal jurisdiction over a person who contracts to insure any person, property or risk located in South Carolina at the time of contracting. S. C. Code—Ann. §36-2-803(1)(f) (1976). Anglo-American [the insolvent insurance company] is subject to *in personam* jurisdiction in South Carolina because it contracted with Senn of Georgia to insure a risk in South Carolina. The Georgia legislature requires the Georgia Pool to assume the obligations of an insolvent insurer in regard to covered claims for a specified period following the date an insurer is determined to be in-

> solvent. Ga. Code Ann. §33-36-9 (1990). The Georgia Pool is "deemed to be the insurer for such period with respect [to] and to the extent of the claims with all the rights, duties, and obligations of the insolvent insurer...." Id. Moreover, as a condition of doing business in Georgia, an insurer is deemed to have appointed the Georgia Pool as its agent with respect to the investigation, adjustment, compromise, and settlement of covered claims in the event the insurer becomes insolvent. Id. §33-36-13.
>
> Based on the plain language of the Georgia Code, once Anglo-American became insolvent, the Georgia Pool became subject to the jurisdiction of the courts of this state as Anglo-American's alter-ego and agent. We find that the trial judge did not err in holding that the Georgia Pool is subject to *in personam* jurisdiction in South Carolina.

Id. at 833-34. After determining that the Georgia Pool was subject to personal jurisdiction in South Carolina, the South Carolina Supreme Court then proceeded to inter-

pret the Georgia Code to determine that the claims at issue were "covered claims" despite the contention to the contrary of the Georgia Pool that they were not covered by the Georgia Code.

It is very interesting, if not significant, that the law of South Carolina is totally contrary to the position taken by SCIGA in its petition. Certainly, if the Supreme Court of South Carolina is willing to hold that the Georgia guaranty association is subject to personal jurisdiction in South Carolina, it only follows that the Supreme Court of South Carolina also would hold that SCIGA would be subject to personal jurisdiction in Alabama for Olivier's claim.

B. Fair play and substantial justice.

In holding that SCIGA was subject to personal jurisdiction in Alabama for Olivier's claim, the Eleventh Circuit also properly and thoroughly addressed whether the assertion of personal jurisdiction over it would comport with fair play and substantial justice.

Contrary to SCIGA's assertion, the Eleventh Circuit properly found that it would not be burdensome on SCIGA to defend suits in other jurisdictions. The court stated:

> We conclude that the associations' obligations to defend suits in other jurisdictions would not be unduly burdensome. Indeed, both LIGA and SCIGA may alleviate the cost of litigation in other jurisdictions by adjusting their insurance assessments. Or if the expenses are too great, they have the option of altering

> their obligations and coverage for claims.
>
> * * *
>
> In addition, as the Supreme Court of the United States has noted: "... modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity." The Supreme Court subsequently stated that the historical developments noted in McGee have only accelerated in the generation since that case was decided. Requiring adjudication in Alabama will not impose a substantial burden on LIGA and SCIGA.

Id. at 834.

By contrast, the Eleventh Circuit found that requiring Olivier to seek coverage for his claim from LIGA in a Louisiana court and from SCIGA in a South Carolina court would be unduly burdensome and a waste of judicial resources, and also would

frustrate the purpose of the guaranty association statutes. As stated by the Eleventh Circuit:

> It would be unduly burdensome, however, to require Olivier to seek coverage for his claim from LIGA in Louisiana courts and from SCIGA in South Carolina courts. Such requirement would spread thin his resources and would hamper Olivier's ability to obtain quick, convenient and effective relief. Indeed, it would frustrate the very purposes of the state insurance guaranty associations. Furthermore, a requirement that Olivier sue in both Louisiana and South Carolina would pose an unnecessary waste of precious judicial resources. Separate litigations do not necessarily ensure fairness; in this case they would inhibit it.

Id.

In sum, the Eleventh Circuit strictly and properly complied with the standards set forth by the Supreme Court and required

by the Due Process Clause of the Fourteenth Amendment in holding that SCIGA is subject to personal jurisdiction in Alabama for Olivier's claim. The Eleventh Circuit carefully and thoughtfully applied the standards set forth in International Shoe, World-Wide Volkswagen and Burger King. SCIGA's assertion that the Eleventh Circuit failed to apply the appropriate due process analysis is totally incorrect.

III. THE NUMEROUS ARGUMENTS SET FORTH BY SCIGA IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI ARE WITHOUT MERIT.

SCIGA's primary argument in support of its petition for writ of certiorari is that SCIGA's due process rights have been violated by the Eleventh Circuit's holding that it is subject to personal jurisdiction in Alabama for Olivier's claim. Section II

of this brief has demonstrated that the Eleventh Circuit strictly and properly applied the standards set forth by the Supreme Court in International Shoe, World-Wide Volkswagen and Burger King, and also required by the Fourteenth Amendment in holding that the LIGA and SCIGA are subject to personal jurisdiction in Alabama for Olivier's claim. In addition to its primary argument, SCIGA also asserts several stream-of-conscious, tangential arguments in support of its assertion that its petition for writ of certiorari should be granted. Those arguments are either mere repetition of the primary argument or red herrings, and they can be dealt with briefly.

First, SCIGA asserts that the South Carolina statute does not guarantee insur-

ance obligations in Alabama. That is an incorrect statement. The statute creating SCIGA provides that SCIGA shall be deemed the insurer in the event of the insolvency of the insurance company for covered claims, which includes a claim against an "insured" of South Carolina. S.C. Code Ann. §38-31-20. There is absolutely no geographical limitation inserted in that provision or any other provision of the South Carolina statute. Certainly, the statute should be deemed to contemplate SCIGA guaranteeing the obligations of an insurer in a situation such as this involving a claim against the insured South Carolina corporation arising out of an incident occurring in Alabama. In Bell v. Senn Trucking Co. of Newberry, 418 S.E.2d 310 (S.C. 1992), the Supreme Court of South Carolina held that the Georgia Insurance

Insolvency Pool covered claims arising out of accident in South Carolina, which holding is directly analogous to the decision below.

Second, SCIGA asserts that the only connection involving the state of Alabama is that Olivier's injury occurred in Alabama. Again, that is an incorrect statement. Merritt, a South Carolina corporation, was operating in Alabama. Merritt was insured for its Alabama operations by Midland, and after Midland went into liquidation, SCIGA guaranteed Midland's contractual obligations to insure Merritt's Alabama operations. Furthermore, the Merritt insurance policy issued by Midland included an estimated annual premium of $17,970.00 for Merritt's Alabama operations. Undeniably any assessments paid by Midland to

SCIGA were based, in part, upon premiums paid by Merritt to Midland for Merritt's Alabama operations. Accordingly, SCIGA received a pecuniary benefit as a direct result of guaranteeing Midland's contract to insure Merritt's Alabama operations.

Third, SCIGA argues that there is no language in the statute indicating an intention to be sued outside the state of South Carolina and that SCIGA has not consented to be subject to suit in a foreign jurisdiction. The Eleventh Circuit addressed this precise argument, and properly found that it bordered on the specious. As stated by the Eleventh Circuit:

> We think this argument borders on the specious. The intent of the legislature had to be to protect their citizens as either policyholders or victims of the insolvency of an insurance compa-

> ny. It must be remembered that this issue has arisen not because Merritt became insolvent but because Midland Insurance Company became insolvent. If Merritt had remained solvent, it would have had to pay the judgment but for the existence of the guaranty associations. The South Carolina legislature intended to protect its citizens (such as Merritt) who were policyholders from such losses. In reaching our conclusion in this case, we disregard the bankruptcy of Merritt.

Olivier, 979 F.2d 832, n. 7. Significantly, the court found that the history surrounding the creation of the guaranty associations and the express language of the guaranty acts demonstrated that SCIGA consented to suit in foreign jurisdictions for covered claims.

Fourth, SCIGA repeatedly asserts that the Eleventh Circuit improperly relied upon McGee v. International Life Insurance

Company, 355 U.S. 220 (1957). The Eleventh Circuit did in fact correctly rely on McGee for the proposition that a company with insurance obligations in a state in which it has no other business has submitted to the jurisdiction of the state's courts. The Eleventh Circuit then properly relied upon the language from statutes creating the SCIGA to find that that association stands in Midland's shoes and therefore is subject to personal jurisdiction to the same extent as Midland would have been had it not become insolvent. That analysis was totally proper.

Fifth, SCIGA asserts that the Eleventh Circuit's ruling is improper because it will allow an Alabama court to determine the substantive issue of whether Olivier's claim is a covered claim and other substan-

tive issues related to the South Carolina guaranty statute. That argument is totally spurious. Under choice of law rules, courts in one state frequently apply the substantive law of another state. That is not unusual or improper. Furthermore, SCIGA's argument that the substantive and procedural issues pertaining to SCIGA should be decided by the Supreme Court of South Carolina, and no other court, is totally contrary to the Supreme Court of South Carolina's analogous decision in Bell v. Senn Trucking Company of Newberry, 418 S.E.2d 310 (S.C. 1992).

Sixth, SCIGA suggests that Olivier's claim is not a "covered claim." The limited law available on this issue provides that the judgment Olivier seeks to enforce arises out of a "covered claim" within the

meaning of the South Carolina Guaranty Act. Deshotels v. SHRM Catering Services, Inc., 538 So. 2d 988 (La. 1989); Sifers v. General Marine Catering Company, 892 F.2d 386 (5th Cir. 1990), aff'd in part and rev'd in part on other grounds, 897 F.2d 1288 (5th Cir. 1990). At the very least, and as noted by the Eleventh Circuit, Olivier has a "colorable claim" which supports a finding of personal jurisdiction.

Seventh, SCIGA asserts that the effect of the Eleventh Circuit's decision will be severe on all state guaranty associations. As pointed out earlier, the Eleventh Circuit addressed this precise issue and found that its holding would not be unduly burdensome on state guaranty associations.

Eighth, SCIGA argues that the Eleventh Circuit's interpretation of the South Carolina guaranty act was a violation of the Tenth Amendment because SCIGA's amenability to suit outside South Carolina is a matter reserved to the state, absent express delegation to the United States by the Constitution. That argument is frivolous for two reasons. First, the Tenth Amendment is not applicable here because federal courts have pendent jurisdiction over state law issues when, as here, jurisdiction is found in admiralty and maritime jurisdiction. Second, assuming the Tenth Amendment is applicable, the history of the creation of the guaranty associations and the express language of the South Carolina Guaranty Act demonstrate that SCIGA consented to suit in foreign jurisdictions.

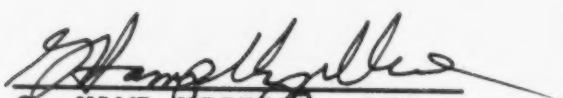
Finally, SCIGA argues that the Eleventh Circuit's decision was a violation of the full faith and credit clause or principles of comity. The United States Supreme Court has long held that full faith and credit is not denied to the statute of another state where the court of another state or the federal court does not deny the statute's validity, but only construes it. Banholzer v. N.Y. Life Ins. Co., 178 U.S. 402 (1900). See also Johnson v. N.Y. Life Ins. Co., 187 U.S. 491 (1908). This principle holds true even if the construction is later determined to be wrong. Moffett v. Robbins, 81 F.2d 431, 437 (10th Cir. 1936). In the case at bar, the Eleventh Circuit was construing the statute at issue, not questioning its validity. Thus, the Eleventh Circuit's act of interpreting

the statute did not violate the full faith and credit clause or principles of comity.

CONCLUSION

SCIGA's petition for writ of certiorari should be denied.

Respectfully submitted,



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